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REVIEW ESSAY

TRUTH, JUSTICE, AND THE AMERICAN CONSTITUTION

FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION. By Ronald Dworkin. Cambridge, Massachussetts: Harvard University Press, 1996. Pp. 347. $35.00.

LAW AND TRUTH. By Dennis Patterson. New York: Oxford University Press, 1996. Pp. 182. $39.95.

*Reviewed by Michael C. Dorf**

In Freedom's Law, *Professor Ronald Dworkin asserts that the constitutional provisions that protect individual rights embody moral principles, thus requiring interpreters to conduct a "moral reading" of the Constitution. Professor Dorf argues that Dworkin does not always persuade that his moral readings of particular clauses are correct, but that Dworkin does set forth a potentially powerful method for interpreting the entire Constitution.*

Dorf draws upon Dworkin's previous writings to show that the moral reading is best understood as an application of Dworkin's view of law as integrity. Under that view, a judge decides a case by choosing the interpretation that best fits the whole of our legal tradition, with principles of political morality playing an important role in this process. Dorf considers Dworkin's claim that the moral reading produces right answers even in hard cases in light of the postmodern critique of ultimate truth, as exemplified by Professor Dennis Patterson's Law and Truth. *Although Dorf finds a metaphysical difference between the postmodern view and law as integrity, he maintains that the two theories yield the same interpretive method.*

Dorf questions the utility of Dworkin's specific applications of the moral reading in cases involving individual rights because Dworkin's arguments appear unlikely to persuade readers who do not share his views on contested moral issues such as abortion or the right to die. In those areas where disagreement does not so clearly rest on differences about first principles, however, the moral reading is more compelling. Dworkin's justification for the moral reading supports extending its use to all constitutional interpretation. The moral reading, Dorf concludes, has great potential in areas that Freedom's Law *does not explore.*

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INTRODUCTION

During his long and distinguished career, Ronald Dworkin has championed a broad collection of claims about Anglo-American jurisprudence. Principal among these are: that there really are right answers in hard cases;[1] that the law consists of not only rules with an on/off character but also principles that must be weighed;[2] that rights do not derive their content from consequentialist judgments but have a deontological status;[3] that judges decide hard cases by attempting to put the law in its best possible light, given past practice and principles of political morality;[4] and that despite appearances to the contrary, contemporary society in fact manifests widespread consensus about basic moral propositions.[5]

Dworkin's latest book, *Freedom's Law: The Moral Reading of the American Constitution*, at first may appear to be less ambitious than some of his earlier works. On the surface, *Freedom's Law* merely collects a variety of previously published essays on a number of constitutional issues. Uniting the essays, however, is a claim no less broad than those upon which Dworkin has made his reputation. He argues that the abstract guarantees of the United States Constitution—especially its prohibition on deprivations of life, liberty, or property without due process, its guarantee of equal protection of the laws, and its protection of freedom of speech—should be read as embodying moral principles rather than political compromises.[6] The *moral reading*, as Dworkin would have judges practice it, requires that particular decisions be justified by reference to principles of political morality. In *Freedom's Law*, as in his earlier works, Dworkin argues both for his *approach* to constitutional interpretation—*some* moral reading—and for his *implementation* of that approach—a *particular* moral reading. This Essay examines both aspects of Dworkin's project.[7]

Dworkin alternates among three justifications for the moral reading. First, he sometimes argues that the moral reading follows simply from the language used by the Constitution. Terms like "due process" and "freedom of speech" are so much more abstract than, say, the requirement that the President be at least thirty-five years old, that the former are most

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1. See Ronald Dworkin, A Matter of Principle 119–45 (1985) [hereinafter Dworkin, Principle].

2. See Ronald Dworkin, Taking Rights Seriously 14–45 (1978) [hereinafter Dworkin, Rights].

3. See id. at 90–94, 101–30.

4. See generally Ronald Dworkin, Law's Empire (1986) [hereinafter Dworkin, Law's Empire].

5. See generally Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom (1993) [hereinafter, Dworkin, Life's Dominion].

6. But cf. Max Farrand, The Framing of the Constitution of the United States *passim* (1913) (showing that, as a historical matter, much of Constitution reflects political compromises at Founding).

7. I use the phrase "the moral reading" to refer to Dworkin's general approach, rather than a particular use of that approach.

sensibly read to reflect the intentions of their authors to set down moral principles, even if the latter is not.[8] Second, Dworkin sometimes argues that judges and lawyers in the American constitutional tradition have long understood their task to be one of elaborating moral principles, even if they have not always recognized this explicitly.[9] Thus, to practice constitutional law competently within the American tradition, according to Dworkin, is to practice the moral reading. Third, Dworkin sometimes contends that the best conception of democracy requires that government treat all persons with equal respect (pp. 17–19)—a principle that, according to Dworkin, entails the moral reading.

There is, of course, no necessary inconsistency in Dworkin's multiple justifications for the moral reading. It may well be that the framers of the Constitution shared Dworkin's conception of democracy; that they sought to embody that conception in abstract constitutional language; and that lawyers and judges in the ensuing years have been faithful to their choice of moral principles. If so, then Dworkin's various justifications reinforce one another.

Nonetheless, *Freedom's Law* does not explain how the justifications for the moral reading interact. Suppose that the Constitution had used less sweeping language, or that it were amended to remove one or more of the moral principles Dworkin believes essential to the best conception of democracy. Would Dworkin still insist upon finding that principle in the Constitution, or would he, however reluctantly, acknowledge the primacy of the text, and if so, why? *Freedom's Law* addresses this kind of question only indirectly.[10] To appreciate fully Dworkin's jurisprudential

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8. See p. 8 (distinguishing equal protection from minimum-age requirement for President and from Third Amendment's prohibition on quartering of soldiers in private homes during peacetime). As I explain in Part I, *Freedom's Law* generally uses the term "moral reading" synonymously with "principled reading"—a term that invokes Dworkin's general approach to jurisprudence. See infra Part I. Nevertheless, the Introduction to *Freedom's Law* asserts that "the moral reading is not appropriate to everything a constitution contains" (p. 8). This claim suggests that Dworkin here means to distinguish between readings that treat constitutional clauses as principles and those that treat such clauses as *moral* principles. I reject this interpretation because Dworkin's earlier work makes clear that he believes that principles in law are principles of political morality. See Dworkin, Law's Empire, supra note 4, at 96, 239. Thus, I argue in Part IV that despite Dworkin's claim to the contrary, his jurisprudential commitments ought to lead him to apply a moral reading to the entire Constitution. See infra Part IV.

9. See pp. 3–4 (stating that "[l]awyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements"); p. 265 (describing Robert Bork's judicial philosophy as rejection of constitutional tradition of moral reading).

10. Bruce Ackerman puts the question starkly, hypothesizing a partial repeal of the First Amendment, and the adoption of a new amendment stating, "Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden." Bruce Ackerman, We the People: Foundations 14 (1991). Ackerman states that any contention that the new amendment is itself unconstitutional ought to be summarily rejected, see id., although he asserts that rights-foundationalists, a group in which Ackerman places Dworkin, see id. at 11, would conclude otherwise, see id.

argument in *Freedom's Law*, one needs to understand it as part of his larger jurisprudential project. Toward that end, in this Essay I juxtapose the jurisprudence of *Freedom's Law* with a critique of Dworkin's overall jurisprudence put forward by Dennis Patterson in his sweeping new book, *Law and Truth*.

The essay proceeds in four parts. Part I addresses the theory of interpretation underlying the essays in *Freedom's Law*. Much of that theory is negative; Dworkin devotes a substantial portion of his energy to setting forth reasons for rejecting the claims of originalists as ultimately unworkable or incoherent. *Freedom's Law* does not, however, offer much in the way of an affirmative case for morality as the guiding spirit of constitutional interpretation. Dworkin's defense of his favored interpretive method appears in his earlier works, especially *Law's Empire*.[11] Evaluating the principal claims of *Freedom's Law* therefore requires some familiarity with Dworkin's broader project. Not surprisingly, Part I concludes that the constitutional argument in *Freedom's Law* is strengthened if one accepts Dworkin's general jurisprudential commitments.

One of the seemingly central features of Dworkin's jurisprudence is the claim that there are right answers in law, even in hard cases (p. 341).[12] Part II considers a particularly powerful critique of this claim—Dennis Patterson's postmodernism. In *Law and Truth*, Patterson describes how various jurisprudents answer the question of what it means to say that a proposition of law is true (Patterson, p. 3). When lawyers and judges argue about what the law *is*, what, exactly, are they arguing about? Patterson claims that most jurisprudential approaches attempt to answer this question by specifying the external criteria that make statements of law true or false. For example, a Hartian positivist would say that a statement of law is true if it emanates from an institution or person that rules of recognition deem authoritative.[13] By contrast, Dworkin would say that a proposition of law is true if it constitutes the best interpretation of the law as a whole.

Despite the important differences among positivism, Dworkin's jurisprudence, and the other approaches Patterson discusses, Patterson argues that most of them share an essential flaw: they mistakenly assume that the truth-values of legal statements are given by conditions external

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at 14–15. This does not appear to be an accurate characterization of Dworkin's view. Dworkin rejects the absolute natural law position, under which a judge may set aside enactments that violate natural law, even if they clearly satisfy the Constitution (p. 316). But Dworkin does not state whether his opposition to absolute natural law rests ultimately on a version of positivism, or whether he rejects absolute natural law because it departs too far from the practice of American constitutionalism. See p. 316 (stating that "no scholar claims that part of what the Constitution plainly says is not binding on judges because it is too immoral to be law"). For a more detailed discussion of these themes, see infra Part IV.A.

11. See Dworkin, Law's Empire, supra note 4 *passim*.

12. See Dworkin, Principle, supra note 1, at 119–45.

13. See H.L.A. Hart, The Concept of Law 89–107 (1961).

to the practice of legal argument. Relying on the work of Richard Rorty,[14] Hilary Putnam,[15] and the later Wittgenstein,[16] Patterson outlines a postmodern jurisprudence that has little use for questions about the ultimate truth or falsity of legal propositions. Truth in law, Patterson claims, is simply a matter of how the forms of legal argument are used.

After setting forth Patterson's general approach, Part II describes Patterson's analysis of Dworkin. I argue that even if one accepts Patterson's critique of Dworkin's view that there are right answers in hard cases, Dworkin's interpretive method survives. In explaining his own postmodern approach, Patterson contends that "[i]n law, we choose the proposition that best hangs together with everything else we take to be true" (Patterson, p. 172). But this is precisely Dworkin's principle of law as integrity, which requires judges to make the law cohere in the light of language, precedent, practice and morality (pp. 10–11). Although Patterson disagrees with Dworkin on what it *ultimately* means to say that a proposition of law is true, the metaphysical disagreement has no practical consequences.[17]

The true test of Dworkin's moral reading will be its application. Accordingly, in Part III, I summarize and evaluate the primary claims Dworkin makes regarding the substantive controversies that give rise to the essays collected in *Freedom's Law*. I focus on two issues that figure prominently in *Freedom's Law*: abortion and freedom of speech and the press. Although I find Dworkin's defense of his view of the proper constitutional treatment of these issues lucid and insightful,[18] I conclude that Dworkin's views often rest on assumptions or intuitions that are less widely shared than he acknowledges. Most opponents of the abortion right or Dworkin's vision of free speech will likely remain opponents after reading *Freedom's Law*. The moral principles involved in debates about abortion and (to a somewhat lesser degree) free speech are hotly contested in part because they rest on different moral premises. Dworkin's interpretive method—which gives moral principles an important role—will naturally produce different results depending upon the moral principles employed. The fact that any moral reading will thus engender con-

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14. See Richard Rorty, Philosophical Papers (1991); Richard Rorty, Consequences of Pragmatism (1982).

15. See Hilary Putnam, Representation and Reality (1988).

16. See Ludwig Wittgenstein, Philosophical Investigations (G.E.M. Anscombe trans., 3d ed. 1958).

17. Patterson is not troubled by my claim that his disagreement with Dworkin has no practical consequences. "Philosophy is not about practical consequences," he states. Letter from Dennis Patterson, Distinguished Professor of Law, Rutgers University School of Law, to the Author (Oct. 11, 1996) (on file with the Columbia Law Review). "Philosophy is about the felicitous characterization of activities and practices." Id. If Patterson wishes to view his own work in this way, that is his prerogative, of course. From the perspective of one who does not share Patterson's viewpoint, however, it seems a little odd that he believes that truth is a matter of practice and that practical consequences don't matter.

18. In the interest of full disclosure, I should add that I generally agree with Dworkin's bottom line on these issues.

troversy does not, by itself, count as an indictment of Dworkin's method. Nevertheless, views about concrete cases have a way of influencing one's views about methodology.

In Part IV, I contend that Dworkin's case for the moral reading is partially weakened by his choice to focus on such hotly contested issues of political morality. Part IV begins by returning to the ambiguity in *Freedom's Law* I identified above: the question *why* we should view the Constitution as embodying moral principles. I suggest that Dworkin's normative argument for the moral reading is a specific instance of his general argument for law as integrity. I argue that, if this is so, then the moral reading ought to apply to the entire Constitution, and not merely to constitutional provisions that protect individual rights. Thus, Part IV sketches the implications of the moral reading for issues not addressed by *Freedom's Law*. I argue that the moral reading may have a significant role to play in those structural areas of constitutional law, such as federalism, that do not directly involve individual rights. Although the stakes in such cases can be extremely high, they do not typically call forth the sort of passion that individual rights cases do. Hence, Dworkin's quest for principled interpretation may be more successful (because less divisive) in such cases. I conclude, however, by noting that application of the moral reading to issues such as federalism raises additional serious questions about the general justifications for the moral reading.

I. THE JURISPRUDENCE OF *FREEDOM'S LAW*

The moral reading posits that the abstract clauses of the Constitution embody moral principles. How does a judge decide the content of these principles? Is this enterprise one of pure political morality by the judge? *Freedom's Law* answers these questions by relying on Dworkin's views about law in general. Possible readings must be constrained by a variety of factors, including text, precedent, and practice. In other words, the requirement of *integrity* operates as a significant restraint on the way constitutional principles may be formulated. Morality is crucial to Dworkin's reading of the Constitution, but it is morality within the framework of law as integrity. Dworkin's case for the moral reading thus depends on his case for law as integrity. In this Part, I locate *Freedom's Law* within Dworkin's broader jurisprudential philosophy of law as integrity.

The chapters of *Freedom's Law* that discuss the failed Supreme Court nomination of Judge Robert Bork[19] present Dworkin's moral reading by contrasting it with originalism. Dworkin contends that Bork offers no principled argument for the level of abstraction at which Bork chooses to view the intentions of the Framers. The abstraction question forms the centerpiece of Dworkin's critique of Bork, but it is also essential to Dworkin's affirmative views.

19. These are Chapters 12, 13, and 14.

Dworkin offers *Brown v. Board of Education*[20] as the starting point for his critique of originalism. Because of the central place *Brown* occupies in modern constitutional law, Dworkin contends that "[n]o theory seems acceptable that condemns that decision as a mistake" (p. 268). Yet the proponents of the Fourteenth Amendment did not intend it to outlaw segregated education.[21] How does Bork reconcile *Brown* with originalism?

As Dworkin notes, in justifying *Brown*, Bork looks to the intentions of the Framers at a fairly abstract level. Bork contends that judges should not consult the concrete expectations and opinions of the framers about what would or would not constitute a denial of equal protection. Instead, judges should identify the principle the Framers enacted and then decide for themselves whether the challenged practice is consistent with the principle.[22]

Dworkin approves of this approach (pp. 269, 299), but goes on to criticize Bork for failing to provide a principled method for deciding how abstractly to characterize the principle chosen by the Framers. Did the Framers mean to adopt the principle of color-blindness, as Bork argues, or the principle that government may not discriminate on the basis of prejudice, as Dworkin contends (pp. 270, 299–300)? Dworkin concludes that we must "assign to the framers a principle that is sufficiently general not to seem arbitrary and ad hoc" (p. 271). Doing so will, according to Dworkin, mean endorsing the results in many cases that Bork deems illegitimate (p. 271).

Dworkin's treatment of the abstraction question is critical to his own affirmative approach to interpretation. He rejects narrow originalism as inconsistent with the actual practice of constitutional law. In principle, he approves the broader originalism endorsed by Bork to salvage *Brown*,

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20. 347 U.S. 483 (1954).

21. Dworkin cites Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 118–19 (1977) for this proposition (pp. 268, 381 n.3). Berger's historical claims have been challenged, most recently by Michael McConnell, who argues that many in the Reconstruction Congress viewed segregation as incompatible with the Fourteenth Amendment. See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1049–117 (1995). But see Herbert Hovenkamp, The Cultural Crises of the Fuller Court, 104 Yale L.J. 2309, 2337–43 (1995) (reviewing Owen M. Fiss, Troubled Beginnings of the Modern State, 1888–1910 (1993)) (claiming that Fiss's view that Fourteenth Amendment was identified with desegregation is unsupported by evidence); Michael J. Klarman, *Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1883 (1995) (criticizing McConnell's belief that Framers of Fourteenth Amendment were sympathetic to integration). As I have noted elsewhere, the efforts to challenge the conventional wisdom merely confirm the importance originalists place upon reconciling *Brown* with their methodology. See Michael C. Dorf, A Nonoriginalist Perspective on the Lessons of History, 19 Harv. J.L. & Pub. Pol'y 351, 357 (1996).

22. See pp. 268, 298–99 (citing Robert H. Bork, The Tempting of America: The Political Seduction of the Law 162–63 (1990)).

but Dworkin takes this as a mere starting point.[23] While Bork fails to provide a method for selecting the appropriate level of generality, Dworkin contends that he (Dworkin) succeeds.

Note, however, that the issue is not one of abstraction, per se. For example, in the equal protection context, Bork's principle of color-blindness is both narrower and broader than Dworkin's principle condemning discrimination based on prejudice. Bork's principle is narrower because, unlike Dworkin's, it would not condemn discrimination on the basis of sex or sexual orientation, while Dworkin's would. On the other hand, Bork's principle would condemn affirmative action programs designed to benefit racial minorities at the expense of non-minorities, whereas Dworkin's would not (p. 300).[24] Thus, Dworkin's critique of Bork poses the question how to decide which of a variety of abstract principles a constitutional provision embodies.[25]

Dworkin states in the Introduction to *Freedom's Law* that he favors "a particular way of stating the constitutional principles at the most general possible level" (p. 7). The qualifier "possible" is crucial for several reasons.

The *most* general level of a principle is essentially empty. Consider the Equal Protection Clause.[26] Does it, for example, mean that the State's failure to enact laws redistributing all property and mandating uniform income denies equal protection to the poor? If equal protection requires strict equality of outcomes, apparently the answer is yes. On the other hand, interpreting the concept as requiring equality of opportunity would condemn many redistributive programs. If A works harder than B, then it denies A's entitlement to be rewarded equally for her work when the State redistributes her income to B. The abstract concept of equality cannot by itself decide between the competing, somewhat less abstract conceptions of equality. Thus, the most general *possible* level of a principle must immediately include the qualifier that the principle be sufficiently concrete to guide some actual decisions.

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23. The maneuver exactly tracks Dworkin's approach to the speaker's meaning theory of statutory interpretation. In *Law's Empire*, Dworkin hypothesizes a judge, Hermes, who begins with the view that a judge should give statutes the effect their authors intended. Dworkin shows that because of the inevitable ambiguities in this approach, Hermes will eventually be led to search for principles that transcend the concrete intentions and expectations of legislators. He will, in other words, be led to the method of Dworkin's Hercules, law as integrity. See Dworkin, Law's Empire, supra note 4, at 317–33; see also text accompanying notes 30–33 (discussing Hercules as judge implementing law as integrity approach).

24. See also Dworkin, Law's Empire, supra note 4, at 393–97.

25. See generally Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 101–04 (1991) (arguing that there is no single metric or direction of abstraction).

26. See generally Amartya Sen, Inequality Reexamined (1996) (describing different conceptions of equality); Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 547 (1982) (arguing that principle of treating like kinds similarly offers no guidance absent moral conception of what characteristics are alike).

Before considering additional qualifiers, I should address an objection to the argument I have just proposed. A critic might note that every moral principle will be susceptible to multiple interpretations. For example, suppose we settle on a conception of equality that condemns discrimination based on prejudice against minority groups. We still will find substantial disagreement over what counts as such prejudice. Does a state policy favoring intra-racial adoption constitute impermissible ratification of the prejudice of private parties,[27] or does it constitute a laudable effort to strengthen the child's ability to combat prejudice? The anti-discrimination principle itself cannot choose between these conceptions.

This criticism suggests that no abstract principle will be sufficiently concrete to decide all cases. That is true, but largely beside the point. Only a purely mechanical approach—such as "always sustain legislative power"—would be self-applying. It is in the nature of a moral principle that its application will often be controversial.[28] My objection to the principle of "equality" as such is not that it could not guide all cases. The objection is that it would guide hardly any cases. To have utility, a moral principle must provide substantial guidance, but need not (and cannot) be mechanical.

A moral principle must be sufficiently abstract so that it does not appear ad hoc, yet sufficiently concrete to provide actual guidance. These are important constraints, but they hardly decide among all competing principles. The choice between competing principles, Dworkin maintains, must be made according to two criteria: integrity and political morality.[29]

In *Law's Empire*, Dworkin asks how Hercules, a judge with infinite time to decide each dispute, resolves hard cases. Dworkin describes three phases of adjudication. The first is pre-interpretive. Hercules locates the thing to be interpreted. This stage typically involves no controversy. In a constitutional case, there will be agreement that it is the text of the Constitution that must be interpreted.

The second phase requires Hercules to apply criteria of fit. Hercules assembles potential principles as candidates for use in deciding the case. He eliminates from his list all of those candidates that are inconsistent with so much of the accepted body of law as to fail to qualify as interpretations of that law. Dworkin analogizes the process to the creation of a chain novel—a novel written by successive authors. Once n chapters

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27. Cf. Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984) (holding that court may not take account of likely private prejudice to prefer same-race couple to interracial couple in custody determination).

28. Note that I am not here relying on Dworkin's distinction between rules and principles. See Dworkin, Rights, supra note 2, at 14. The application of a rule may be controversial in the same way that the application of a principle may be.

29. *Freedom's Law* includes a short summary of what law as integrity is (p. 83), but not Dworkin's broader argument for why our constitutional tradition should be viewed as an instance of law as integrity. For the latter, see Dworkin, Law's Empire, supra note 4, at 225–75.

have been written, the n+1th chapter may take a variety of different forms, but many candidates will be ruled out as having too little to do with the content of chapters one through n.[30]

In the third phase, from among the candidate principles that meet the minimum requirements of fit, Hercules must choose the principle that puts the law as a whole in its best possible light. This task engages moral judgment, but it also engages fit, because Hercules will sometimes sacrifice his conception of ideal justice to conform his judgment to the remaining body of law. This is because integrity itself serves a moral principle—that the law should be interpreted as if it emanated from a single author, committed to laying down principled norms.[31]

Dworkin's argument for the single-authorship principle is complex and subtle, but for my present purposes it boils down to two essentials. First, because a community does not have mental states in the same way that we imagine an individual does, discovering the intent of the drafters of a statute or constitutional provision invariably necessitates *constructing* intent. Dworkin argues that the best method for constructing a collective intent involves constructing a coherent intent, that is, an intent that *could* emanate from a single mind committed to stating consistent principles.[32]

The second piece of Dworkin's argument for the single-author approach is more openly a proposition of political morality than a general interpretive theory. Dworkin contends that in a constitutional democracy, the government must treat all persons with equal respect—and that at a minimum, this requires that the distinctions the government draws among persons must be supported by arguments of principle rather than by mere favoritism.[33] In interpreting the law, therefore, judges should not be free to treat various provisions as preferring the welfare of some over others for unprincipled reasons. The single-authorship concept enables judges to think of the law as reflecting the views of a principled community.

The equal respect principle and the single-author principle that Dworkin derives from it are quite ambiguous. Although some public choice theorists suggest that laws should be interpreted as reflecting the spoils of a competition among mutually hostile interest groups,[34] most judges would accept Dworkin's prescription of principle.[35] They would disagree, however, over what constitutes a principled decision in a given

30. See id. at 228–54.

31. See id. at 167–75, 186–224.

32. See, e.g., id. at 343 (discussing use of legislative history in constructing "acts of the state personified").

33. See id. at 173–75.

34. See, e.g., Frank H. Easterbrook, The Supreme Court 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 15–18 (1984).

35. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) ("[A] decision without principled justification would be no judicial act at all."); cf. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15–19 (1959) ("The main constituent of the judicial process is precisely that it must be genuinely principled.").

case. Thus, the full meaning of Dworkin's theory can only be grasped by examining its applications. Before doing so, however, it will be useful to consider a critique of Dworkin's basic outlook.

II. THE POSTMODERN CRITIQUE OF THE MORAL READING

Within the American constitutional tradition, the most obvious objection to Dworkin's moral reading would focus on institutional setting. When the Constitution uses abstract language susceptible to a variety of interpretations, why should judges prefer their own interpretations to those given by representative bodies?[36] The Introduction to *Freedom's Law* outlines Dworkin's answer to what Alexander Bickel termed the "countermajoritarian difficulty."[37] Dworkin contends that the practice of judicial review strengthens rather than undermines democracy, because constitutional democracy utilizes majoritarian rule primarily as a means of according citizens equal respect; legislation that denies persons equal respect is thus inconsistent with constitutional democracy (pp. 15–35).

It may be useful to think of Dworkin's approach to the practice of judicial review as belonging to the same family as John Hart Ely's approach. Whereas Ely would largely confine judicial review to correcting breakdowns in the political process,[38] however, Dworkin believes that judicial review also ought to be available for policing the substantive boundaries of governmental authority (pp. 21–26). Dworkin ventures that such substantive review both ensures that government does not interfere with areas of life that government has no legitimate authority to control, and has the added benefit of removing such contentious issues as abortion and the right to die from the realm of ordinary politics—where they tend to swamp the legislative agenda.[39]

Ultimately, however, the institutional criticism is not crucial, because *Freedom's Law* does not address the legitimacy of judicial review as such.

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36. See, e.g., Cass Sunstein, Earl Warren Is Dead, The New Republic, May 13, 1996, at 35 (contending that Dworkin does not adequately defend his interpretive method against charge that it gives too much power to unelected judges).

37. Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962).

38. See John Hart Ely, Democracy and Distrust: a Theory of Judicial Review (1980). Dworkin would probably disapprove of the comparison. See Dworkin, Principle, supra note 1, at 57–69 (critiquing Ely's approach to judicial review).

39. James Fleming criticizes Dworkin's claim that substantive rights such as abortion are among the pre-conditions of democracy in the same way as procedural rights such as voting are. See James E. Fleming, Fidelity to Our Imperfect Constitution, 65 Fordham L. Rev. (forthcoming Mar. 1997); see also James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1, 14 (1995) (arguing that, following Dworkin's general approach, the best interpretation of the Constitution as a whole includes protection for both substantive rights and procedural rights); Frank I. Michelman, Democracy and Positive Liberty: Intimations From New Constitutional Theory, B. Rev., Oct.–Nov. 1996, at 3, 4 (constrasting Dworkin's substantive approach with Jürgen Habermas' procedural approach). Fleming's critique is limited to Dworkin's method, rather than the substance of his argument.

The book is about *how* to read the Constitution, rather than *who* should read it.[40] Even if the Constitution were entirely non-justiciable, elected officials would still have an obligation to comply with and therefore interpret it. Dworkin proposes that his method should apply to all constitutional interpreters. A satisfactory criticism of the moral reading would thus have to critique the moral reading as practiced by legislators no less than judges.

In this Part, I consider a critique of Dworkin's approach that focuses on the substance of his program rather than the institutional setting. The challenge comes from an assortment of philosophical positions that may be usefully grouped under the heading "postmodernism." Although self-styled postmodernists disagree about precisely what postmodernism is, for present purposes it will be sufficient to explore one account of postmodernism—that presented in Dennis Patterson's new book, *Law and Truth*. As I argue below, however, how one goes about reading legal texts does not in any significant way depend upon whether one accepts Dworkin's (or Patterson's) views about ultimate truth.

As Patterson acknowledges, *Law and Truth* is largely "a work of demolition" (Patterson, p. 181). Its principal targets include most of the leading approaches to jurisprudence—the formalism of Ernest Weinrib (Patterson, pp. 22–42), the moral realism of Michael Moore (Patterson, pp. 43–58), the legal positivism of H.L.A. Hart (Patterson, pp. 59–70), Dworkin's account of law as integrity (Patterson, 71–98), and Stanley Fish's account of law as the product of interpretive communities (Patterson, pp. 99–127).

Patterson's critique draws heavily from philosophy of language. It is one of the great virtues of *Law and Truth* that Patterson's lucid prose manages to use this often highly technical body of writing to illuminate the jurisprudential debate rather than obfuscate it. Patterson has independently valuable insights about each of the approaches he critiques, but his primary goal is to show how all of these approaches—including Dworkin's—share a common flaw. Patterson argues that most accounts of jurisprudence rest on a false notion of what makes a proposition of law true (Patterson, p. 151). I conclude, however, that Dworkin's account of law can be rendered consistent with Patterson's postmodern jurisprudence.

A. *Realism, Anti-Realism, and Postmodernism*

Law and Truth begins and ends with a discussion of the relation between the realist/anti-realist debate in jurisprudence and that debate in philosophy. Realists believe that knowing the meaning of a proposition consists in knowing what facts in the world would make it true. For example, the statement "Dinosaurs became extinct because of climatic changes

40. Dworkin contends that the moral reading is consistent with a variety of institutional arrangements allocating final constitutional authority (pp. 33–34).

caused by a meteor striking the Earth," is true if and only if events in the distant past correspond with what the statement asserts.[41] We may not know whether the statement is true, but that does not alter the fact that it is (or is not) true.

Anti-realists deny the possibility that "the truth conditions for a proposition may lie beyond our capacities to recognize them" (Patterson, p. 5). As one anti-realist explains, " 'anti-realism rests on the proposition that speakers grasp the meaning of, or understand, a sentence when they know which conditions warrant its assertion.' "[42] Knowing the meaning of a statement here means knowing the conventions that must be satisfied to *verify* its truth. If the anti-realist lacks epistemic access to the cause of the dinosaurs' extinction, she will deny that the above statement is a meaningful one.

Similarly, moral philosophers may be divided into realist and anti-realist camps. A moral realist believes that moral propositions are true, even though we lack the tools to prove their truth. Moral anti-realists deny this, and accordingly interpret moral statements such as "slavery is wrong" as expressing preferences or emotions of the speaker. Thus, according to the moral anti-realist, the speaker means to say that he dislikes slavery or slavery makes him feel bad (Patterson, p. 6).

Despite their differences, Patterson argues that realism and anti-realism are united in an important respect: both accept that knowing the meaning of a statement consists in knowing the conditions that make the statement true. For the realist, these conditions are facts in the world that may or may not be beyond our epistemic access. For the anti-realist, the truth conditions consist of conventional criteria of verification (Patterson, pp. 6, 167).

Patterson proffers postmodernism as an alternative account of meaning that does not depend on conditions. The difficulty with realism, Patterson argues, is its inability to explain how our language corresponds with reality—the absence of a medium through which word and world interact. The difficulty with anti-realism is its apparent denial of the possibility of having knowledge about the external world apart from our conventions. Patterson argues that postmodernism overcomes both of these difficulties. Postmodernism acknowledges interaction with the external world, but denies that the external world or our experience of it *produces* truth (Patterson, p. 167). Postmodernism shifts the focus from the truth of propositions about the world to the description of activities in the world (Patterson, pp. 167–69).

Of course, postmodernists still use the word "truth," but rather differently from the way that realists or anti-realists use it. Patterson illus-

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41. See generally Hillary Putnam, Reason, Truth and History (1981) (providing sophisticated defense of philosophical realism that owes much to pragmatism).

42. Patterson, p. 5 (quoting James O. Young, Meaning and Metaphysical Realism, 63 Philosophy 114, 115 (1988)).

trates the postmodern view of truth with a metaphor developed by W. V. O. Quine.[43] According to Quine, our beliefs about the world form a complex web, so that when we say that an interaction with the world causes us to change our view of the world, we mean that we adjust the web. But the web is sufficiently complex that we will have some freedom about where and how to adjust it. As Patterson puts it, we evaluate new experiences by adjusting our web of belief in such a way that best " 'hangs together' with everything else we take to be true" (Patterson, p. 159). For the postmodernist, the criteria for determining what beliefs best hang together provide the meaning of statements. I shall have more to say about Patterson's postmodern conception of meaning, but first, let us see what Patterson's general discussion of realism and anti-realism has to do with jurisprudence.

B. *Postmodern Jurisprudence*

Patterson's treatment of the jurisprudence of Dworkin and of Stanley Fish closely parallels his general treatment of philosophical realists and anti-realists. Patterson casts Dworkin in the role of moral realist[44] and Fish in the role of anti-realist, but goes on to argue that Dworkin and Fish are united in their mistaken belief that the truth of a proposition of law is a matter of conditions external to legal practice (Patterson, pp. 111-17).

The casting is initially plausible. In criticizing legal positivism, Dworkin has characterized it as a form of anti-realism.[45] Moreover, Dworkin's contention that there really are right answers in hard cases, even if we lack the means to prove them, seems to be a realist proposition. Similarly, Patterson's chapter on Fish does a nice job connecting Fish's claims that the meaning of a text is in the reader or, as Fish argues in his more recent work, the conventions held by a community of readers,[46] with the anti-realist view that truth is a matter of convention (Patterson, pp. 99–127). Fish disputes Patterson's characterization of his work,[47] but the precise question of whether Patterson accurately captures Fish's ideas need not concern us here. Patterson's deeper point concerns realist and anti-realist jurisprudence in general.

What is the postmodern alternative to the realist/anti-realist debate in jurisprudence? We can best appreciate Patterson's postmodern approach to jurisprudence by examining his treatment of a legal scholar

43. Patterson, pp. 158–59 (citing Willard Van Orman Quine, Two Dogmas of Empiricism, *in* From a Logical Point of View 20, 42–43 (Harper & Row 1961) (1953)).

44. In this context the term realism should not be confused with Legal Realism. To the extent that Legal Realism treats law as a matter of convention, it is a form of jurisprudential anti-realism.

45. See R.M. Dworkin, Introduction to The Philosophy of Law 1, 8–9 (R.M. Dworkin ed., 1977).

46. See Stanley Fish, Is There a Text in this Class?: The Authority of Interpretive Communities 322 (1980).

47. See Stanley Fish, How Come You Do Me Like You Do?: A Response to Dennis Patterson, 72 Tex. L. Rev. 57, 57–65 (1993).

who, according to Patterson, does not erroneously assume that the truth of a proposition of law is given by conditions. For the most part, Patterson approves of the "modal" approach to constitutional interpretation put forward by Philip Bobbitt (Patterson, pp. 128–50).

Bobbitt develops a typology of forms of argument—what he calls "modalities"—that figure in the practice of constitutional interpretation.[48] Bobbitt identifies textual, doctrinal, historical, ethical, and prudential forms of argument as distinct modalities. According to Bobbitt, constitutional scholars' attempts to legitimate the practice of judicial review are misguided, because legitimacy does not derive from a source external to the practice of constitutional interpretation; any *legal* argument aimed at legitimating constitutional interpretation will necessarily employ one or more of the modalities, leading to the question of what legitimates that form of argument. Bobbitt contends that there is no way out of the cycle, except to stop searching for an external criterion of legitimacy for constitutional interpretation. Bobbitt proposes that constitutional jurisprudence study the use of the modalities.[49]

It is not difficult to see why Patterson finds Bobbitt's approach attractive.[50] We may think of the modalities as the grammar of constitutional argument. Bobbitt does not identify the truth (or legitimacy) of statements of constitutional law with conditions external to the practice of constitutional law. Thus, he avoids what Patterson would call the mistake of realists and anti-realists alike.

Patterson disagrees with Bobbitt in one important respect, however: the question of how to resolve intermodal conflict. In hard cases, various arguments will often point in different directions. The Justices who decided *Brown*, for example, faced strong doctrinal and historical arguments for siding with the school board, but also faced strong textual, ethical, and prudential arguments for siding with the plaintiffs. How does a court resolve such a conflict? According to Bobbitt, the modalities themselves cannot answer this question. When faced with intermodal conflict, the judge must choose the result that produces justice as measured by the judge's own values.[51]

Patterson believes that Bobbitt's resort to subjective judicial conscience does not adequately capture the degree to which adjudication is a public exercise in persuasion. He states: "For recursion to conscience to succeed as a solution to the problem of modal conflict, it must be possible to wed to the exercise of individual conscience an account of constitu-

48. See Philip Bobbitt, Constitutional Interpretation 11–22 (1991); Philip Bobbitt, Constitutional Fate 6–8 (1982).

49. See Bobbitt, Constitutional Interpretation, supra note 48, at 122–40, 155–56.

50. Both Bobbitt and Patterson rely heavily on the later work of Wittgenstein. See George A. Martinez, The New Wittgensteinians and the End of Jurisprudence, 29 Loy. L.A. L. Rev. 545, 545 n.1 (1996).

51. See Bobbitt, Constitutional Interpretation, supra note 48, at 178–86.

tional argument that relies so heavily on a public, intersubjective practice of legal argument" (Patterson, pp. 143–44).

Patterson believes that the practice of argument within the postmodern web of knowledge, rather than individual conscience, resolves intermodal conflict. A lawyer in arguing a case, or a judge in writing an opinion, aims to show that the result she favors best hangs together with everything else taken to be true about the law (Patterson, p. 172). If the opposing counsel or the dissenting judges offer a strict textual argument, Patterson would counter with arguments designed to show that strict textualism is generally unworkable or undesirable.[52] The postmodern judge or lawyer convinces " 'someone of something by appealing to beliefs he already holds and by combining these to induce further beliefs in him, step by step, until the belief we wanted finally to inculcate in him is inculcated.' "[53]

Although this account effectively describes the making of an argument, it does not describe how the listener evaluates the argument. How, according to the postmodern account, does a judge decide which of several competing interpretations fits best with everything else taken to be true? Patterson gives a number of examples in which the preferred interpretation is the one that he says best coheres with legal practices generally (Patterson, pp. 174, 176–79). In each case, however, Patterson simply assumes that the reader will share his conclusions about which interpretation leads to the most coherent view. To be sure, if someone disagrees, he has a strategy for trying to convince her, but if at the end of the day she continues to disagree, she simply will hold a different view about the most coherent interpretation.

In practice, Patterson's approach to interpretation does not differ significantly from Dworkin's. Postmodernism appears to endorse law as integrity: the interpretation that best hangs together with everything else we take to be true about the law is precisely the interpretation that Hercules[54] would favor. But how can this be, given Dworkin's supposedly false view that truth in law is a matter of conditions? To answer this question requires that we consider Patterson's specific objections to Dworkin's jurisprudence.

C. *Postmodernism and Integrity*

Patterson's critique of Dworkin amounts to one central claim—that Dworkin overstates the role of interpretation in law, and in understanding generally, because interpretation is a second-order activity.[55] I argue in this section that Patterson's ultimate philosophical disagreement with

52. See Patterson, pp. 172–74 (discussing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)).

53. Patterson, p. 172 (quoting W.V. Quine & J.S. Ullian, The Web of Belief 86 (1970)).

54. See supra text accompanying notes 29–31.

55. Patterson, p. 86. Patterson adds two additional grounds for criticism: that the need for interpretation is not ever-present in law, and that Dworkin's account of law is

Dworkin has few, if any, practical consequences. Dworkin's concept of law as integrity is the practical equivalent of the postmodern web.

Patterson illustrates his basic criticism with the following example. One diner says to another, "pass the salt" (Patterson, p. 87). In Dworkin's view, the second diner must interpret the request—that is, she must lay her interpretive template over the words to produce meaning. Patterson protests that there is no need for interpretation here because the request is clear. He states: "Understanding is acting properly in response to the request. If the request is vague or otherwise opaque, interpretation of the request may be necessary, otherwise not" (Patterson, p. 87). As Patterson puts it, "[i]nterpretation is an activity of clarification" (Patterson, p. 87). Whereas Dworkin would treat all instances of linguistic understanding as interpretation, Patterson reserves the term interpretation for hard cases. Is this a purely semantic debate about the word "interpretation" or does it have jurisprudential consequences?

Dworkin's and Patterson's respective approaches to easy cases make clear that there is a metaphysical difference. In *Law's Empire*, Dworkin argues that Hercules does not need one approach for hard cases and a different approach for easy cases; he applies the same method in all cases, but in easy cases only one answer will be consistent with integrity.[56] Patterson finds this view implausible. He prefers the conventionalist account, under which "easy cases are easy because there exist established institutional criteria for what counts as a justification for a claim that a given proposition of law is true" (Patterson, p. 90).

Who has the better of the argument? Initially, Patterson's account appears more plausible. It is at least a bit odd to suppose that interpretive theory is at work in easy cases, hidden from view even from the judges deciding the case.

Patterson's critique apparently assumes that law as integrity provides a *causal* account of easy cases. However, Dworkin happily concedes that judges do not in fact engage in an interpretive struggle in easy cases.[57] Nor does Dworkin deny the existence of the conventionalist's "established institutional criteria" in easy cases. He would say that these are the criteria of fit. The fact that they are firmly established is what it means to say the case is easy: fit determines the outcome, and there is no opportunity for the judge to assess competing interpretations that satisfy the criteria of fit.[58] Dworkin's theory does not founder on easy cases. It is sensi-

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descriptively inaccurate (Patterson, p. 86). I treat these as specific applications of Patterson's claim that interpretation is a second-order activity.

56. See Dworkin, Law's Empire, supra note 4, at 265–66, 353–54.

57. See id. at 266 ("Hercules would be happy to concede[ ] that we need not ask questions when we already know the answer.").

58. Consider an analogy. The equations of Einstein's theory of special relativity reduce to Newton's laws of motion for objects travelling at speeds significantly slower than the speed of light. But the fact that Newton's laws are fully adequate to calculate when two trains will meet does not prove that special relativity is not really at work. Similarly, the fact that conventionalism can account for easy cases does not show that law as integrity fails.

ble to speak of interpretation even in easy cases—whether they involve the speed limit in California[59] or a request to pass the salt.

Ultimately, Patterson's critique of Dworkin rests on the same claim as his critique of Bobbitt: that Dworkin's account makes law a personal, rather than an inter-subjective enterprise.[60] Hercules decides for himself what interpretation puts the law in its best light. Patterson's reading of Dworkin is understandable. As an initial matter, Dworkin does not pay much attention to the problems of arriving at consensus on a multi-judge court;[61] thus, he suggests that a judge with his view of interpretation focuses inward. Moreover, Dworkin characterizes the attitude of integrity as "protestant,"[62] by which he means that each reader must ultimately decide the text's meaning himself, rather than relying on an authoritative interpretation.[63] For Dworkin, political obligation means obligation "to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme."[64] Dworkin's language thereby suggests that law as integrity pays insufficient regard to the intersubjectivity of the law, as Patterson claims (Patterson, p. 98).[65]

Nevertheless, Patterson's reading of Dworkin is strained. Patterson sums up what he believes to be wrong with Dworkin's account of interpretation as follows: "The very idea of interpretation as a normative activity demands that the process of interpretation be a practice and not a private conversation with oneself" (Patterson, p. 97). Despite his talk of protestantism, Dworkin need not (and in my view, does not) deny this. The requirement of fit ensures that the interpretation the judge adopts is one that is largely shaped by the legal community. That is, after all, what it means to say that an interpretation fits the law.

What then of hard cases? In hard cases, Dworkin says the judge must choose from among competing interpretations, each of which could be said to fit the law. At this point, does Dworkin's account require the judge to retreat into himself? In one sense, of course it does. If two competent judges acting in good faith would at this point give different an-

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Just as slow-moving objects are a special case of Einstein's theory, so easy cases are special cases of Dworkin's. And it makes no difference that most of our experience involves slow-moving objects or easy cases.

59. See Dworkin, Law's Empire, supra note 4, at 266.

60. Patterson's position appears to derive from Wittgenstein's critique of private language. See Ludwig Wittgenstein, Philosophical Investigations §§ 68–77 (G. E. M. Anscombe trans., 2d ed. 1958).

61. However, when Dworkin does pay attention to the interpersonal dynamics of the Supreme Court, he has interesting insights. See p. 66 (examining positions of individual Justices in plurality in Webster v. Reproductive Health Services, 492 U.S. 490 (1989)).

62. See Dworkin, Law's Empire, supra note 4, at 190, 413.

63. See Sanford Levinson, Constitutional Faith 30–37 (1988) (distinguishing between Protestant and Catholic styles of constitutional interpretation).

64. Dworkin, Law's Empire, supra note 4, at 190.

65. Patterson levels the same criticism at Fish (Patterson, pp. 125–26).

swers, surely this is because they are *different* judges. Each judge applies the law as he understands it.

But what alternative is there? If the judge does not apply the law as he sees it, he must apply someone else's view of the law. For a Supreme Court Justice deciding a constitutional question, this means applying what he believes to be the wrong view of the law. This is hardly an attractive alternative.[66]

In hard cases, Hartian positivists hold that the law is indeterminate, so that a judge has discretion.[67] Bobbitt contends that in such cases the conscience of the judge mediates the conflict among forms of argument.[68] Patterson dislikes both views because a private mechanism is at work. He believes that hard cases call for argument about what view of the law fits best with everything "we take to be true" (Patterson, p. 172). But who is the "we" here? Different judges may believe that different interpretations better fit everything else each takes to be true about the law. Law as integrity at this point asks each judge to articulate a principled argument for why she prefers the interpretation she does. This public articulation may lead another judge to change his mind, but inevitably there will be cases in which it will not.

Dworkin's approach therefore escapes Patterson's objections about intersubjectivity. Moreover, it also survives Patterson's linguistic objection. Even if we assume that Patterson is correct—that truth is not a matter of conditions—no practical consequences follow. Dworkin believes that finding the interpretation that best hangs together with everything we take to be true about the law means finding a truth that *really is* out there. Patterson protests that this is so much metaphysical nonsense. He says that once we have found the interpretation that best hangs together with everything else, we have found all we can find, and we should not fool ourselves that we have found something that corresponds to a deeper reality. This is an interesting philosophical disagreement, but it has no clear practical bite. In practice, Patterson demands of interpretation exactly the same thing that Dworkin demands: integrity.

In an important sense, Patterson's project succeeds. Patterson states that he has no "intention to advance yet another 'theory of law,' for it is just such an enterprise [he] wish[es] to call into question" (Patterson, p. 181). The methodological similarities between postmodernism and Dworkin's law as integrity illustrate the irrelevance of a theory of law to the resolution of legal questions—even quite abstract legal questions such as "How does a judge discern the law?" Patterson's explication of

66. There are situations in which the law instructs judges to defer to the views of other judges or institutions. See Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 690–95 (1995) (discussing cases in which a single Justice of Supreme Court acts as surrogate for full Court). But in these cases, the judge understands that the law he takes to be correct commands him to defer to someone else's view.

67. See Hart, supra note 13, at 200.

68. See Bobbitt, Constitutional Interpretation, supra note 48, at 178–86.

postmodernism sheds light on Dworkin's theory because Patterson clarifies the terms in which Dworkin must defend his own claims. The test of the moral reading would appear to be how it actually functions: does the practice of constitutional law provide the means for showing how a moral reading best hangs together with everything else we take to be true? This sort of question can only be answered by looking at how the moral reading is used—a question I address in the next Part.

III. The Moral Reading in Practice

To present a flavor of how Dworkin himself would practice the moral reading, in this Part I discuss his treatment of the substantive controversies that gave rise to the essays in the first two sections of *Freedom's Law*. Rather than discuss each essay separately, I concentrate here on the two issues that dominate the book: abortion[69] and free speech.

A. *Abortion*

Dworkin's defense of the proposition that the Constitution forbids government from proscribing abortion prior to the late stages of pregnancy consists of two main contentions. He first explains why many arguments frequently invoked to defeat the abortion right would, if taken seriously, undermine the Supreme Court's role as guarantor of virtually all individual rights. He then goes on to offer an affirmative argument for why the Constitution should be interpreted to recognize an abortion right. Dworkin succeeds splendidly in the first task, but in my view, is less successful in the second.

One objection to the Court's decision in *Roe v. Wade*[70] is that the Constitution nowhere mentions abortion or other unenumerated rights that the Court has recognized via the Due Process Clauses of the Fifth

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69. Section I of *Freedom's Law* is titled "Life, Death, and Race." It contains four essays on abortion as well as an essay on the right to die, and a book review of former Solicitor General (now Massachusetts Supreme Judicial Court Justice) Charles Fried's memoirs. The abortion essays were published separately from 1989 to 1992 and, as with all of the essays in *Freedom's Law*, they have not been substantively revised (p. 35). This results in some repetitiveness. Indeed, one paragraph is repeated verbatim in Chapters 1 and 3, compare p. 48 with p. 87, and Dworkin repeats the general thrust of his argument several times. On the other hand, the preservationist approach has the benefit of revealing Dworkin to be an astute Court-watcher. For example, Chapter 2, which was published shortly after the Supreme Court's 1989 decision in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), argues that despite the widespread view among liberals that the case presaged the overruling of Roe v. Wade, 410 U.S. 113 (1973) the opinion hints at the possibility of retaining substantial protection for a constitutional right to abortion (pp. 66–68). That judgment proved prescient, as Dworkin's discussion of Planned Parenthood v. Casey, 505 U.S. 833 (1992), in Chapter 4 illustrates (p. 29). Similarly, Chapter 13, which was published in 1987, predicts that then-Judge Anthony M. Kennedy would be more committed to the constitutional principles of integrity and individual rights than Judge Bork would have been (pp. 284–86), a prediction vindicated by *Casey* as well as other decisions. See, e.g., Romer v. Evans, 116 S. Ct. 1620 (1996).

70. 410 U.S. 113 (1973).

and Fourteenth Amendments. Dworkin responds that such arguments prove too much (pp. 76–81). After all, the Constitution nowhere mentions flag-burning or sex discrimination in so many words. When the Supreme Court has ruled that prohibitions on communicative flag-burning and state-sponsored sex discrimination violate the Constitution, it has relied, respectively, on the First Amendment's protection of "freedom of speech" and the Fourteenth Amendment's guarantee of "equal protection of the laws."[71] There may be reasons why one would disagree with the holdings of such cases. In the case of sex discrimination, one might attribute significance to the fact that the Framers of the Fourteenth Amendment did not intend to prohibit sex discrimination,[72] or one might think that biological differences between men and women often justify different treatment, so that such treatment does not deny equal protection. But it is hardly an argument against the unconstitutionality of sex discrimination that the Equal Protection Clause does not mention sex expressly. Neither does it mention race, although no one doubts that the Equal Protection Clause limits the States' ability to discriminate on the basis of race. Similarly, the First Amendment does not mention flag-burning expressly, but it also does not mention leafletting or standing on a soapbox. It is impossible to specify all of the applications of a norm along with the norm, and accordingly, no serious constitutional scholar argues that the failure of a norm to mention a particular application inevitably means that the norm does not apply.

Thus, the fact that abortion is not "enumerated" as such in the Constitution does not distinguish it from any other putative right. Rather, the relevant question is whether abortion ought to be viewed as a specific application of the Constitution's prohibition of deprivations of "liberty" "without due process of law."[73]

The best textual argument against Dworkin's position is the familiar claim that the Due Process Clause only requires that *when* liberty is deprived, the deprivation must follow fair procedures—i.e., that due process means only what has come to be known as procedural due process, and not (the somewhat oxymoronic) *substantive* due process. Dworkin acknowledges that this is a plausible textual claim (pp. 72–73),[74] but

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71. See J.E.B. v. Alabama, 511 U.S. 127 (1994) (sex discrimination); Texas v. Johnson, 491 U.S. 397 (1989) (flag-burning).

72. As I have argued elsewhere, however, it is unclear why this counts as an argument against treating sex discrimination as a violation of equal protection, rather than as an argument *for* treating it as a violation. See Dorf, supra note 21, at 357–58 (arguing that Framers' sexism demonstrates that women have suffered a history of discrimination).

73. U.S. Const. amend. XIV.

74. This is not to say, however, that there are sound textual reasons for believing that no provision of the Constitution provides substantive protection against state intrusions on liberty. Were it not for the Slaughter-House Cases, 83 U.S. 36 (1872), the Supreme Court might well have settled on the Fourteenth Amendment's requirement that no state interfere with the "privileges or immunities of citizens of the United States." U.S. Const. amend. XIV. As to the federal government, of course, the Ninth Amendment provides a

points out that if one accepts it, then one must acknowledge that cases such as *Griswold v. Connecticut*,[75] protecting a right to use contraception, as well as all of the Supreme Court's decisions protecting family decision-making, were wrongly decided (pp. 50–51).

Having addressed anti-*Roe* arguments that would jettison nearly all of the Court's decisions protecting a zone of privacy, Dworkin turns to the more precise question of whether abortion ought to be a protected right. In his terms, Dworkin asks if the best moral reading prohibits state proscription of abortion.

Dworkin begins by acknowledging the moral difference between abortion and contraception. Unlike most forms of contraception (or, for that matter, consensual sexual acts by adults), abortion arguably involves a harm to an innocent third party—the fetus. For Dworkin, the question therefore comes down to whether the fetus is a person for constitutional purposes.[76] His answer and the way he reaches it are somewhat complicated, but it is worth parsing the details, to illustrate the strengths and weaknesses of the moral reading as Dworkin practices it.

Dworkin's argument rests on a distinction between what he calls "derivative" and "detached" reasons for protecting fetal life (p. 84).[77] A derivative reason *derives* from various persons' own rights and interests. Thus, if the fetus is a person, government has a derivative interest in protecting the fetus from harm, in exactly the same way that it has a derivative interest in protecting all persons from harm. By contrast, a detached reason for action is independent of the rights or interests of specific individuals. When we say that human life has intrinsic worth, or that art exists for art's sake, we identify detached reasons for protecting human life or preserving works of art (p. 94). I argue below that the distinction between derivative and detached interests often collapses in practice, but in theory Dworkin's meaning is plain enough. He means to distinguish between claims that a policy is good because it benefits people (derivative) and claims that a policy is good in itself, apart from its effect on specific people (detached).

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plausible textual basis for the practice of recognizing substantive rights beyond those guaranteed by the more concrete provisions of the Bill of Rights and Article I, section 9. See id. amend. IX.

75. 381 U.S. 479 (1965).

76. Dworkin rejects the argument that abortion should be a protected right even if the fetus is a person (pp. 48, 87). Although he acknowledges that the law generally does not require people to come to the aid of others, he notes that parents are different, and that while the burdens associated with a forced pregnancy are intense, so are those imposed on parents (p. 48). Dworkin does not directly address the fact that abortion prohibitions fall entirely on women, rather than on parents generally—and for that reason could be seen as problematic on equal protection grounds. See, e.g., Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 58 (1977); Frances Olsen, The Supreme Court, 1988 Term—Comment: Unraveling Compromise, 103 Harv. L. Rev. 105, 117–26 (1989).

77. Close followers of Dworkin's work will recognize this distinction as central to his book *Life's Dominion*. See Dworkin, Life's Dominion, supra note 5.

Dworkin draws on the derivative/detached distinction to advance two central claims. First, he contends that a detached interest cannot be a sufficient justification for overriding an individual right of high importance. Second, Dworkin argues that prior to the fetus's attaining some form of consciousness, the government has a detached, but not a derivative interest in preserving it. Dworkin posits that fetuses attain rudimentary consciousness at roughly the time that they become viable,[78] and therefore believes that *Roe* was right in its conclusion that prior to viability the state lacks a sufficiently strong reason to prohibit abortion (pp. 90–95).[79]

What justifies Dworkin's first central claim? He believes that a detached interest cannot override a right because rights are often a zero-sum commodity. For example, Dworkin contends that the states are not free to declare that corporations are persons entitled to vote in state-wide elections because to do so would devalue the right to vote of the natural persons who are already constitutionally entitled to vote (pp. 88–89).[80] Dworkin then argues that recognition of abortion as a constitutional right similarly forbids the State from contracting the right's scope directly or indirectly by, for example, declaring fetuses persons with competing rights—assuming, as Dworkin also argues, and as the Supreme Court agrees, that fetuses are not considered persons by the Constitution itself (pp. 87–90).

Even if Dworkin's argument works in the voting case, the argument is incorrect as a matter of general constitutional doctrine. The Supreme Court has long recognized that fundamental rights may be restricted if the restriction is necessary to further a compelling interest. Although the Court has offered few criteria for determining what constitutes a compelling interest, it has never held that a compelling interest must be one that rises to the level of constitutional right.[81] Interests in economic stability, public safety, and the environment are not matters of constitutional right;

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78. Dworkin's claim that viability and consciousness closely coincide is, of course, an empirical one. Although the crucial issue for Dworkin is consciousness, rather than viability as such, because the existing doctrine uses viability as the relevant constitutional criterion, I shall refer to viability. To the extent that Dworkin's empirical claim is false, his argument applies to consciousness only, not viability.

79. Even before viability, however, the state's detached interest is sufficiently strong to justify the state in taking measures falling short of prohibition to ensure that a pregnant woman give due consideration to the intrinsic value of human life; these measures could include insisting that a woman decide whether to carry the pregnancy to term within a reasonable period of learning of the pregnancy. Thus, Dworkin also approves of the portion of *Roe* that permits states to prohibit post-viability abortions where the continuation of the pregnancy does not threaten the woman's life or health (pp. 55–56).

80. Justice Stevens relied in part on this argument in Planned Parenthood v. Casey, 505 U.S. 833, 913 n.2 (1992) (Stevens, J., concurring in part and dissenting in part).

81. See Erwin Chemerinsky, Constitutional Scholarship in the 1990s, 45 Hastings L.J. 1105, 1114–16 (1994) (reviewing Public Values in Constitutional Law (Stephen E. Gottlieb ed., 1993)) (questioning logic and utility of linking compelling interests to constitutional rights).

yet, under appropriate circumstances, they could be invoked to defeat claims of constitutional rights.

Dworkin could respond to this argument by noting that even if a compelling interest is not itself a matter of constitutional right, it must serve a derivative interest of constitutional persons. But even this more limited claim appears to be false, as an example illustrates.

Suppose that, in violation of the Endangered Species Act,[82] Ishmael's religion requires him to hunt an endangered whale as part of an annual ceremony. Under the Supreme Court's controversial 1990 ruling in *Employment Division v. Smith*, the application of the prohibition on whale hunting would present no question of free exercise of religion because the law does not single out religious practice.[83] However, a congressional statute enacted in response to *Smith* provides that the familiar compelling interest test must apply to laws that, even though they are generally applicable, impose a substantial burden on religion in a particular case.[84] I take it to be an open question under the statute whether the protection of an endangered species is a sufficiently compelling interest to justify burdening the right to free exercise of religion, but there is no reason to suppose the interest would never justify such a burden.[85] Thus, even Congress, which has gone further than the Supreme Court in protecting free exercise of religion, might well have permitted the interest in preserving an endangered species to trump the free exercise right.

Under Dworkin's approach, however, the protection of an endangered species is a detached interest, and is therefore automatically incapable of justifying the infringement of an individual right. For Dworkin, the interest in the continuation of a species—as opposed to the preservation of particular animals that have interests in avoiding suffering and death—is categorically disqualified from overcoming constitutional rights, even though the opposite result can occur under existing law.

Dworkin could argue that the interest in an endangered species ultimately derives from the interests of constitutional persons. Species conservation not only preserves the wonder and diversity of life on the planet for its own sake; such biodiversity also helps ensure a habitable planet for humans and may lead to the discovery of useful products. Yet similarly instrumental claims can be made for every interest that is initially justified in non-instrumental terms. For example, art can be justified for art's

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82. 16 U.S.C. §§ 1531–1544 (1994).

83. See 494 U.S. 872, 877–78 (1990).

84. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified at 5 U.S.C. § 504(b)(1)(C)(iv), 42 U.S.C. §§ 1988, 2000bb to 2000bb-4 (1994)). The Supreme Court will soon decide whether the Act is constitutional. See Flores v. City of Boerne, 73 F.3d 1352 (5th Cir.), cert. granted, 65 U.S.L.W. 3282 (1996); see also Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1210–19 (1996).

85. Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 580 (1993) (Blackmun, J., concurring) (terming prevention of cruelty to animals "not a concern to be treated lightly").

sake, but also for the edification it brings to those who view it. More to the point, the state's interest in pre-viable fetal life could be justified on the basis of the positive effects for already born human beings who might benefit from the general respect for all human life that abortion regulations arguably produce. For Dworkin to maintain that derivative interests alone justify infringing basic liberties, apparently he must define derivative interests so broadly as to include fetal life.

Furthermore, Dworkin's direct argument for the claim that the state has only a detached interest in a pre-viable fetus is unlikely to convince anyone that does not already hold that view. Dworkin effectively demonstrates that the fact that it would now be against an existing person's interest if his mother had decided to have an abortion rather than to bear him does not imply that it would have been against anyone's interest at the time she had the abortion. After all, it would have been equally against the interest of the now-existing person if his mother had gone on a long business trip instead of conceiving him (pp. 91–92). This is a negative point only, however. Dworkin's affirmative case relies on the claim that "nothing has interests unless it has or has had some form of consciousness" (p. 91). This claim is central to Dworkin's argument, and yet he offers no persuasive reason why someone who does not hold this view would change her mind.

First, consider an example Dworkin does not address in *Freedom's Law*. Does a dead person have interests? In the language quoted above, Dworkin makes past or present consciousness a necessary condition of interests, but not a sufficient condition. Thus it is not clear whether he would say that a dead person has interests. If a dead person did have interests, in what would they consist? We can envision two kinds of interests. The first rests on what Dworkin would term religious views, in the broad sense—that is, views about the intrinsic value, meaning, and purpose of life (p. 108). Dworkin argues that although government may urge people to care about such issues, it cannot dictate one answer for all people (pp. 104–10). Thus, the overall thrust of Dworkin's argument rules out a claim that a person's soul or spirit has interests that last beyond death.

Consider a second kind of interest of the dead. Laws concerning the disposition of property following death apparently reflect the view that a person's interest in the well-being of her loved ones and in the continuation of the goals she sought to advance during her life, survive her death. But the logic of Dworkin's approach to the putative interests of the fetus suggests that this way of thinking of things is confused. Honoring a dead person's intentions means honoring the intentions of the person *when she was alive*. At the time that we enforce a will, the person whose interests are served has—from a completely secular standpoint—ceased to exist. The fact that she once had interests does not mean that she now has interests. On this view, laws concerning decedents' estates primarily serve

to reassure the now-living that their intentions will be followed after their death.

Thus Dworkin's argument about abortion appears to lead to the conclusion that the dead lack interests. If this is so, what category of beings does Dworkin believe have interests by virtue of having "had" consciousness? Consider the case of an otherwise healthy person in a temporary but complete state of unconsciousness, unable to experience pain or any other sensation. Let us stipulate that her prognosis is good, so that we expect her to regain consciousness soon, and to live a long, fulfilling life. Does she have interests now? If someone were to kill her, would the act violate her interests or would it merely violate a detached interest?[86]

I suspect that nearly everyone would answer that the killing violates the unconscious patient's own interests and that Dworkin's reference to beings that have "had" consciousness appears specifically designed to cover this case. Notice an oddity, however. The fact that the unconscious person will, if not killed, some day attain consciousness, does not distinguish her from a pre-viable fetus. Similarly, the fact that she has had consciousness in the past does not distinguish her from a dead person. Yet by Dworkin's reasoning neither pre-viable fetuses nor the dead have interests. Why then does the unconscious person? In other words, other than Dworkin's intuition, what justifies distinguishing the unconscious patient from the other two cases?

Neither *Freedom's Law* nor *Life's Dominion* (in which Dworkin sets forth a lengthier version of the same claim)[87] provides the kind of philosophical argument necessary to sustain the correlation between, on the one hand, past and future consciousness, and on the other, interests. Nonetheless, let us put these difficulties aside for now. Even if we cannot articulate exactly why, many of us may share Dworkin's intuition that a pre-conscious fetus lacks interests (and that a temporarily unconscious person has interests). Still, we are left with the question of why the detached interest in the sanctity of all human life does not justify abortion restrictions. Why, in other words, must the legality of abortion restrictions be judged without reference to views about the ultimate meaning and purpose of life?

Indeed, we can envision a critique that casts Dworkin's argument for the abortion right as running away from the central claim of *Freedom's Law*, if not the central claim of Dworkin's career. For decades Dworkin

86. Perhaps the killing is motivated by a desire to serve derivative interests; the killer wishes to harvest the unconscious person's organs for transplantation in other persons with diseased organs. See Judith J. Thomson, The Trolley Problem, 94 Yale L.J. 1395, 1396 (1985) (describing hypothetical problem posed first in Philippa Foot, The Problem of Abortion and the Doctrine of the Double Effect, *in* Virtues and Vices and Other Essays in Moral Philosophy 19, 27–29 (1978)). See generally Frances Myrna Kamm, Mortality, Morality (1993) (examining ethical and moral problems that arise in context of life and death decisions).

87. See Dworkin, Life's Dominion, supra note 5, at 213–17.

has been arguing that the legal positivist distinction between law and morality ignores the reality that moral principles suffuse the law.[88] Yet views about the ultimate value, meaning, and purpose of life—the kinds of views Dworkin apparently would banish from constitutional discourse about fundamental rights[89]—in turn suffuse the moral reasoning likely to be at stake in important questions of constitutional law. One can hardly explain *why* a conscious being has an interest in avoiding pain, or in continuing to live, or in having her dreams fulfilled, without relying on views about the ultimate value, meaning, and purpose of life. For this reason, critics of John Rawls have argued that it is impossible to bracket one's views about such ultimate issues and still debate questions of fundamental value in a way that captures what is important to most people in the society under consideration.[90] This critique appears to be equally applicable to Dworkin.

In the case of abortion, the moral reading Dworkin proposes rests on two contested moral claims: that a non-viable fetus lacks interests of its own; and that the state should not be permitted to pursue its detached interest in the sanctity of life by prohibiting abortion. Dworkin does not appear to have a strategy for convincing those readers who disagree with either or both of these moral claims. Before addressing the consequences of this gap, however, it will be instructive to see how he applies the moral reading to questions involving freedom of speech.

B. *Free Speech*

Throughout the essays concerning free speech,[91] Dworkin argues that the relevant constitutional principle is best understood as one valuing free speech not merely as a means, but fundamentally as an end. Dworkin contends that part of what it means for government to treat all people with equal respect is for government to allow people the moral

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88. See Dworkin, Law's Empire, supra note 4, at 1 ("There is inevitably a moral dimension to an action at law."); Dworkin, Taking Rights Seriously, supra note 2, at 147 (arguing that constitutional interpretations calls for judges to "frame and answer questions of political morality").

89. Note that Dworkin would not banish all consideration of detached interests from constitutional law. He would allow the state to further an interest in the intrinsic sanctity of life by measures falling short of coercion (p. 55). As Frances Kamm notes, however, if Dworkin's objection to arguments based on the sacredness of life is that such arguments are religious rather than secular, they should not play *any* legitimate role in constitutional decisionmaking. See Frances M. Kamm, Abortion and the Value of Life: A Discussion of *Life's Dominion*, 95 Colum. L. Rev. 160, 175 (1995) (book review).

90. See Kamm, supra note 89, at 174; see also Michael J. Sandel, Political Liberalism, 107 Harv. L. Rev. 1765, 1767 (1994) (reviewing John Rawls, Political Liberalism (1993)).

91. With one exception, the essays in the second section of *Freedom's Law* concern the constitutional principle of free speech. The exception is Chapter 11, which provides a defense of the related principle of academic freedom. Academic freedom is not a strict subset of freedom of speech both because universities are unusual communities, see Rust v. Sullivan, 500 U.S. 173, 200 (1991), and because many universities are private, and therefore not subject to the requirements of the First Amendment.

responsibility to make up their own minds about matters of justice or conscience (p. 200). This principle implies broader protection than the most common instrumental justification—the notion that truth is likely to emerge in a free marketplace of ideas. Dworkin argues that if speech were only protected for this instrumental reason, it would be permissible to censor speech that, as a categorical matter, appeared unlikely to contribute to human knowledge. Although he acknowledges that such censorship would call for difficult line-drawing, he sees no reason to conclude that the task would be insurmountable, allowing that the most virulent forms of hate speech could be suppressed without seriously imperiling more valuable speech (pp. 203–04).[92]

Dworkin connects his non-instrumental defense of free speech to the legitimacy of government. Government forfeits a substantial claim to legitimacy, Dworkin argues, "when it disqualifies some people from exercising" their responsibility to form and communicate their own convictions "on the ground that their convictions make them unworthy participants" (p. 200).[93] Dworkin invokes this principle to defend the application of First Amendment protection to pornography (pp. 214–43), and to criticize some aspects of the Supreme Court's approach to defamation law.[94]

The non-instrumental moral principle of free speech is, for Dworkin, merely an instance of the political and legal ideals that he finds in the Constitution, namely:

> [G]overnment must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedom of speech and religion. (Pp. 7–8.)[95]

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92. Dworkin does not, however, entirely eschew the slippery slope argument. Instead, he cautions the reader to "[b]eware principles you can trust only in the hands of people who think as you do" (p. 225).

93. Cf. Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics 94–98, 145–49 (1994) (offering similar defense of liberalism based on perfectionist premises).

94. Although Dworkin generally approves of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), he offers two criticisms. First, he contends that the distinction between defamation actions by public officials and those by ordinary people assumes that political speech is more important than other kinds of speech, an assumption that rests on what Dworkin sees as the mistaken view that the First Amendment is primarily a means, rather than an end (pp. 193–94). Second, Dworkin dislikes the subjective element of *Sullivan*—the requirement that the plaintiff prove recklessness on the part of the press—because it makes reporters' notes and files relevant to a defamation action, and therefore subject to formal discovery motions (p. 190). This criticism, along with Dworkin's proposal that *Sullivan* be partially replaced by a retraction option (pp. 192–93), rests primarily on instrumental concerns.

95. See also Charles L. Black, Jr., Structure and Relationship in Constitutional Law 39–41 (1969) (arguing that the structure of American government would prohibit state infringement of free speech even if there had been no First Amendment).

Thus, freedom of speech does not receive protection simply because the First Amendment specifically identifies free speech. Instead, for persons to have equal moral and political status, government must respect the right of free speech.

What other freedoms must government respect? The language quoted above tells us to include free exercise of religion as well as the other freedoms protected by the express language of the Constitution. Dworkin's discussion of abortion makes clear that procreative autonomy is similarly essential (p. 111). What method does Dworkin propose for identifying those freedoms that are essential to equal moral and political status? To make the matter more concrete, what justifies Dworkin's conclusion that the freedom to enter a contract to labor for less than the minimum wage or for longer than the maximum number of hours per week is not required by his principle of equal moral and political status (pp. 125, 208)?[96]

Dworkin answers that no formula can demonstrate that *Lochner v. New York*[97] was wrongly decided; all we can do about "bad decisions is to point out how and where the arguments are bad" (p. 82). This is a fair point, but it tends to confuse Dworkin's claim that the freedoms he defends as essential to equal dignity are non-instrumental.

Consider two arguments against treating freedom of contract as an essential freedom. First, one could argue that the freedom of contract differs from, say, procreative autonomy or speech. Freedom of contract does not figure into a person's self-definition in the same way that these other, protected freedoms do. Moreover, perhaps people value economic freedom less than they value procreative autonomy or speech.

Second, one could point to concrete harms associated with freedom of contract as grounds for permitting interference with freedom of contract. Given the unequal bargaining strength of labor and management, permitting workers to agree to whatever terms the market dictates means that workers will accept far less than management would be otherwise willing to offer. Moreover, at a macroeconomic level, regulation may be deemed necessary to ameliorate the effects of the business cycle. At least since the late 1930s, the Supreme Court has permitted government regulation predicated on assumptions such as these.[98]

Dworkin is thus correct that there are good arguments for rejecting the claims of economic libertarians. The problem, however, is that there are also good arguments for rejecting claims for freedom of speech—and their structure resembles the structure of the economic arguments.[99]

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96. The question is not purely hypothetical. Reviewing *Freedom's Law*, Richard Epstein chided Dworkin for giving short shrift to economic rights. See Richard A. Epstein, The First Freedoms, N.Y. Times, May 26, 1996, § 7 (Book Rev.), at 12.

97. 198 U.S. 45 (1905).

98. See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937).

99. In addition to the parallels explained below, similarities exist between the marketplace of ideas rationale for free speech and economic libertarianism. Cass Sunstein

Although some kinds of speech no doubt play an important constitutive function for many people, this is hardly true for all speech, or for all people. And just as we might say that a person who defined herself in terms of her paycheck has chosen an unworthy self-definition, so we might say the same about one who defines herself in terms of her ability to produce or consume pornography. Moreover, as a subjective matter, it is a contestable proposition that people value speech. Certainly many people would value economic well-being over the right to express themselves.

Similarly, one might point to concrete harms associated with particular kinds of speech as a justification for limiting that speech. Dworkin cites a number of studies finding no clear evidence of a causal connection between pornography and sexual crimes (pp. 206, 230, 375 nn.21–22, 378 n.4). But if pornography were not protected speech, the government would not bear the burden of proof on such questions; it would be a sufficient basis for regulation if one could hypothesize a rational connection between the subject of regulation and the harm.[100] Just as the Court accepts the plausibility of the harms associated with freedom of contract, it would accept the plausibility of the harms associated with pornography.

What, then, justifies treating speech—or to be more precise, certain categories of speech, such as pornography[101]—differently from economic liberty? As Dworkin says, the arguments for economic liberty are bad, while presumably the arguments for free speech are good. But what exactly does it mean for an argument to be bad, or unconvincing?

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has argued that both the *Lochner* Court's view of the market and the modern Court's view of the marketplace of ideas rest on what he calls "status quo neutrality." Cass R. Sunstein, The Partial Constitution 40–41, 154–55 (1993). According to Sunstein, during the *Lochner* era, the Court treated the complex common law rules about contract and property as if they were natural, artificially deeming non-enforcement policies as interference. See id. at 45–48. Similarly, he argues that the modern Court acts as though specific speech-limiting laws infringe free speech, while ignoring the impact of the vast network of background government regulation that shapes the exercise of speech rights. See id. at 228–30.

100. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (holding that "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it").

101. Some have argued that pornography should not be protected because it is more properly characterized as sexual paraphernalia than as speech. According to this view, pornographic images are no more speech than other, non-expressive masturbatory aids. Dworkin rejects this claim because pornography produces arousal via mental intermediation (pp. 240–42). See also American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985) (discussing how pornography's effects, like all speech, depends on mental intermediation, and is therefore no different in this respect from subversive political speech). This is a somewhat strange rejoinder, because mental activity almost always plays a role in sexual arousal, even when no images or descriptions are employed. See Kevin W. Saunders, Media Self-Regulation of Depictions of Violence: A Last Opportunity, 47 Okla. L. Rev. 445, 474 (1994) (arguing that mental intermediation involved in pornography-based arousal is not sufficiently distinguishable from other types of sexual arousal).

Dworkin might mean that he finds the empirical assumptions underlying the case for economic liberty to be considerably more dubious than those underlying the case for a broad principle of free speech. This is a perfectly reasonable reaction, but note that it rests protection for free speech on an instrumental basis.

For Dworkin to rest his case for free speech on a non-instrumental justification, he must make the claim that, as an intrinsic matter, the ability to form and express ideas free of coercion by the state is essential to equal respect, whereas the ability to form contracts with no interference by the state is not. This claim may strike many readers as a proper normative judgment. Note, however, that on this understanding, protection for free speech does not *follow from* the idea of equal dignity; the notion that speech must be free is an unprovable first principle of constitutional government.

If Dworkin truly means to give a non-instrumental justification for free speech, then in answer to the question "Why must speech be free?",[102] he must offer a theory of personhood in which speech plays a more important role than, say, economic activity. Moreover, he must confront the fact that many readers of the Constitution will reject such a theory. To be sure, Dworkin can make a plausible case that a non-instrumental theory of free speech provides the best *fit* with existing doctrine. Art, music, and literature all enjoy robust First Amendment protection, even though they may have little to do with the search for truth or political accountability (pp. 233, 238).[103] But if we assume that a narrower view of the First Amendment would also fit our constitutional tradition, then, as in the case of abortion, Dworkin does not have a strategy for convincing those who, after reflection, think free speech intrinsically unimportant.

C. *Evaluating Dworkin's Moral Reading*

Readers who share Dworkin's moral sensibilities (as I do), will find his case for an abortion right and a broad right of free speech convincing. What about readers with different moral sensibilities? They will reconcile the demands of fit and morality differently. Does the inevitability of disagreement undermine Dworkin's case for a moral reading? To answer this question, let us engage in a Dworkinian thought experiment.

Imagine that it is 1973, and Justice Hercules[104] must decide *Roe v. Wade*. He begins with the Due Process Clause of the Fourteenth Amendment. Let us suppose that he comes up with three candidate principles: (1) the Constitution protects only those rights enumerated in the Bill of Rights; (2) the Constitution protects a right of procreational and sexual

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102. This is the title of Chapter 8 of *Freedom's Law*.

103. See also Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating that the Framers "valued liberty both as an end and as a means").

104. See supra text accompanying notes 29–31.

autonomy, limited by harms to third parties; (3) the Constitution protects an absolute right of procreational and sexual autonomy. The requirement of fit will quickly dispose of the first and third conceptions. Hercules adopts the second principle.

The second principle does not, however, decide the case. Hercules must ask the further question of whether and when abortion constitutes a harm to third parties. This is partly a question of fit. Hercules can look to how our legal system generally treats fetuses. Can they inherit? Does the state punish battery of a pregnant woman more severely when it results in the destruction of the fetus? Let us assume that Hercules concludes that a wide range of answers to the question of whether abortion constitutes harm to a third party would fit our constitutional law satisfactorily. He must now ask what answer will show that law in its best light. This is the moral question.

Suppose that Hercules believes that all human life has intrinsic value, and that abortion almost always diminishes or insults that intrinsic value. According to Dworkin's argument in *Freedom's Law*, Hercules must disregard this view because it rests on a quasi-religious foundation. He must disregard it because

> [a] state may not curtail liberty, in order to protect an intrinsic value, (1) when the decisions it forbids are matters of personal commitment on essentially religious issues, (2) when the community is divided about what the best understanding of the value in question requires, and (3) when the decision has a very great and disparate impact on the person whose decision is displaced. (Pp. 101–02 (footnote omitted).)

This three-fold principle sounds like a proposition of liberal pluralism. If Hercules accepts it, he must rule for the plaintiff in *Roe*.[105] But why should Hercules accept pluralism? Presumably, Dworkin would argue that it fits and justifies our constitutional practice better than any competing principle.

Notice, however, that we have assumed that a ruling for the state in *Roe* would fit well enough with our constitutional system to count as a plausible interpretation. Hercules may believe that some competing principle is more just than pluralism—at least in the context of this case. Perhaps, like most Americans, Hercules' religion is very important in his life,[106] and he does not believe it possible to isolate his views about the ultimate meaning and purpose of human life from his legal decisions. Some comprehensive moral views deny that government should act in a way that remains neutral with respect to individual conceptions of the

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105. I am assuming that Hercules also accepts Dworkin's contention that the state lacks derivative interests in the fetus.

106. See Gustav Niebuhr, Religious Beliefs and Practices of Five Religious Groupings, N.Y. Times, June 25, 1996, at A18 (reporting results of poll by Pew Research Center for the People and the Press, finding that 59% of respondents say religion is very important in their lives).

good. Some of these comprehensive views in turn insist that abortion must be illegal under most circumstances. If Hercules rejects pluralism in favor of such a comprehensive moral view, he will think that American constitutionalism's traditional concern for *life*, liberty and property would be put in its best possible light by protecting the rights of the unborn. If so, he would only adopt the pluralist principle if he believed that principle *fit* American constitutionalism so much better than the alternative that sacrificing ideal justice for the sake of fit would be warranted.

If Hercules holds the views I have attributed to him, Dworkin cannot ultimately convince Hercules that he should rule for the plaintiff in *Roe*. But that is not a reason why someone who *agrees* with pluralism should reject Dworkin's argument. As Dworkin explains in his critique of Oliver Wendell Holmes's moral skepticism, if someone believes a moral proposition, the fact that she cannot prove its truth in the same way that one proves scientific propositions does not in any way undermine the fact that she believes the moral proposition to be true.[107] Plainly it would have been a serious mistake for Justice Brennan to have voted for the state in *Roe* simply because his colleague Justice Hercules (or White or Rehnquist) was unconvinced of the soundness of pluralism.

Dworkin's argument may appear paradoxical. In justifying a principle that requires deference to individual conscience when the community is deeply divided (criterion number two about "religious" views), how can Dworkin ignore the fact that the community is (let us assume) deeply divided about the principle of deference to individual conscience itself? This is not a paradox so much as it is a confusion, however. Liberal democracy of the sort Dworkin advances claims that government must remain neutral with respect to some subset of people's conception of the good. However, as a constellation of propositions of political morality, liberalism cannot be neutral with respect to political morality itself. Liberalism asserts values that may or may not be shared by any given person.[108]

At this point it might appear that the differences between Dworkin on the one hand and anti-realists and postmodernists on the other be-

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107. See pp. 340–42 (contrasting Holmes's skepticism with Learned Hand's skepticism); see also Dworkin, Law's Empire, supra note 4, at 78–85 (contrasting external and internal skepticism).

108. Dworkin is well aware of the problem. See Dworkin, Rights, supra note 2, at 234–38; Ronald Dworkin, What is Equality? Part 1: Equality of Welfare, 10 Phil. & Pub. Aff. 185, 197–204 (1981) (discussing difficulty in achieving equality of people's preferences in community where diverse political theories are held); see also Larry Alexander, Liberalism, Religion, and the Unity of Epistemology, 30 San Diego L. Rev. 763, 764 (1993) (suggesting that "the liberalism I endorse is itself just a sectarian view on the same level as the religious and other views that it purports to be neutral about and to tolerate"); Nomi M. Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 581, 612–13, 650–51 (1993) (discussing the paradox of liberalism—which requires tolerance for the intolerant).

come critical. The disagreement over whether to accept a particular liberal conception of political morality would not trouble Dworkin because he insists that, even if others disagree, liberalism provides the *right* answers to moral questions. By contrast, an anti-realist or a conventionalist postmodernist such as Patterson would view the disagreement over abortion (prior to the decision in *Roe*) as an indication that the law is indeterminate on this question. Accordingly, he might worry about the legitimacy of a body such as the Supreme Court deciding the case.[109]

Recall, however, that in practice Dworkin uses the same techniques to argue for his view as postmodernists use to argue for theirs. A Dworkinian judge, like a postmodern judge, chooses the interpretation that best hangs together with everything else he takes to be true. When two Dworkinian judges disagree about which moral principles are right, it matters little that they agree that *some* principle is right. That agreement typically will not move them to agree on the resolution of the particular case.

None of the above discussion should be taken to imply that Dworkin's approach is unworkable. A certain level of discord in constitutional adjudication is tolerable; indeed it is inevitable. Nonetheless, the more discord one encounters, the more one senses that contested principles of morality are drowning out the criteria of fit. The case for the moral reading would therefore be strengthened by some indication that its basic feature—the requirement that the Constitution be treated as a charter of principle rather than mere expediency—facilitates agreement. Toward that end, Dworkin's project would benefit were he (or someone else) to apply the moral reading to issues that produce less profound moral disagreement than the questions of life and death on which Dworkin has thus far concentrated.[110] In the next and final Part, I argue that despite his suggestion to the contrary in *Freedom's Law* (p. 4), the moral reading should apply to nearly all constitutional interpretation, and that a defense of such a broadened moral reading would greatly strengthen Dworkin's argument.

IV. The Scope of the Moral Reading

Although Dworkin defends the moral reading only in the context of individual rights, in this Part I contend that his argument logically extends to all constitutional interpretation. To explain why this is so, I be-

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109. Patterson, following Bobbitt, does not himself worry about the legitimacy of having the Supreme Court decide contested moral questions (Patterson, pp. 129–32). In my view, he ought to, although this is not to say that Supreme Court decisions in this area are illegitimate. See generally Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Originalism, 85 Geo. L.J. (forthcoming May 1997).

110. Perhaps for this reason, Dworkin is at his best when discussing the question of "whether the Endangered Species Act gives the secretary of the interior power to halt a vast, almost finished federal power project to save a small and ecologically uninteresting fish." Dworkin, Law's Empire, supra note 4, at 313.

gin by re-examining the reasons Dworkin gives in support of the moral reading.

A. *Justifications for the Moral Reading*

What is the basis for the moral reading? First consider the answer that appears most prominently in *Freedom's Law*: the Constitution embodies moral principles because the most natural reading of its text and the history of its adoption suggest that the Framers of the Constitution intended to lay down moral principles. Dworkin makes this point clearly in the Introduction to *Freedom's Law*. In arguing against those forms of originalism that look to the concrete expectations of the Framers, he states that the relevant inquiry concerns what the Framers intended to say, not what other intentions they may have had (pp. 9–12).

In some parts of *Freedom's Law*, Dworkin suggests that the words "due process," "equal protection," and "freedom of speech" by themselves require a moral reading (p. 7). The plain meaning of such abstract terms, Dworkin contends, will entail abstract rights. Thus, according to this argument, we should infer that the Framers intended a moral reading from the fact that they used words that imply a moral reading. The difficulty here, as with all plain meaning arguments, is that it depends on an assertion. Many readers will find ambiguity in the language Dworkin deems plainly moral. The Due Process Clause, after all, could reasonably be read as establishing merely procedural norms. In any event, if the point of the plain meaning argument is to discern what its drafters intended to say, there is no reason not to consider that question directly.[111]

In the case of the Equal Protection Clause, Dworkin contends that the Framers intended to enact a broad principle: "that government must treat everyone as of equal status and with equal concern" (p. 10). The important point for present purposes is not what principle the Framers intended to enact, so much as the fact that we look for a principle because they intended one. I shall call this the *actual intent* reason for seeking interpretations of principle, because it rests on the assumption that the framers *actually intended* to enact a particular moral principle.

Next consider a different basis for seeking an interpretation of principle. Suppose that a judge wants to find the actual intent of the framers of the Fourteenth Amendment, but upon confronting the historical evidence she discovers a muddle. Some of those who supported it intended the words "equal protection of the laws" to mean roughly what Dworkin takes the words to mean, the broad principle of equal status and concern. Others, however, understood the words as a shorthand for formal *political* equality rather than *social* equality.[112] They, no less than those with the broader view, intended to enact a principle, albeit a different one. Still

111. Moreover, I argue below that the plain meaning view is broadly inconsistent with Dworkin's interpretive method. See infra text accompanying notes 118–124.

112. See Hovenkamp, supra note 21, at 2337–43.

others of the Amendment's supporters intended merely to restate propositions they believed were already contained in the Constitution, but to make clear that Congress has the authority to enforce them against the States.[113] Finally, suppose a great number of the Amendment's supporters gave no thought whatsoever to questions of principle, but merely supported the measure because they thought it would achieve certain concrete results they favored.

The actual intent approach would yield an indeterminate answer to the question of whether the amendment embodies a principle and, if so, what principle. Indeed, because amendments are always adopted in stages by multi-member bodies and for multiple purposes, it would seem that the actual intent approach will never yield a determinate intent, principled or otherwise. Thus, the judge must construct the intent. As Dworkin argues in *Law's Empire*, a judge who begins by seeking the actual intent of the legislature will inevitably be led to an interpretive project, asking what principle would have served as the best justification for the provision adopted.[114] I call this the *constructive intent* approach, because the judge must construct an abstract principle to enforce. She does not simply find it in the text or history of the provision's adoption.

Although *Freedom's Law* sometimes reads as if Dworkin is relying upon actual intent, he never marshals the kind of evidence that would be necessary to infer an actual intent. Moreover, he has consistently argued that actual intent may be indeterminate. Consequently, when Dworkin states that the Framers intended to enact a particular broad principle, he should be understood as referring to their constructive rather than their actual intent.

Once we recognize that the Framers' intent is constructed by the judge (or other interpreter), however, continued talk of intent is misleading. Dworkin is not really talking about the ideals of the Framers at all, but the ideals that best justify particular constitutional provisions.

Dworkin's direct political argument for interpreting the Constitution as containing moral principles does not differ significantly from his political argument for law as integrity generally.[115] He seeks a view of the law that legitimates the state's monopoly of coercive force.[116] Law as integrity emerges as a satisfactory conception because it best explains the obli-

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113. See Earl M. Maltz, The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction, 45 Ohio St. L.J. 933, 935–37 (1984) (describing political factions in Congress that proposed Fourteenth Amendment).

114. See Dworkin, Law's Empire, supra note 4, at 327–33.

115. Parts of *Law's Empire* suggest that the principle of integrity follows inevitably from the idea of interpretation itself. See, e.g., id. at 52–53 (discussing interpretation of custom of courtesy); id. at 55–57 (discussing interpretation in art). In my view, however, Dworkin means to rest his argument for integrity in law on his arguments of political philosophy. For a critique of these arguments, see Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis, 105 Yale L.J. 2031, 2037 (1996) (maintaining that deontological accounts of precedent fail).

116. See Dworkin, Law's Empire, supra note 4, at 190–92.

gations of members of a community to obey the law even when they disagree with the law. By requiring that the actions of the state be principled, law as integrity accords members of the community equal respect. This means, Dworkin argues, that differences in treatment must be justified by differences in principle, not merely by political compromises.[117]

Thus, Dworkin argues that the moral reading is the right one mainly because it follows from the best understanding of the principle of justice that holds that government must treat people with equal dignity. If one agrees, Dworkin has met half his burden; he has connected the moral reading to principles of justice. But what about fit? Does the moral reading fit the actual practice of constitutional law? Certainly, Dworkin is correct that some of the landmark decisions of our era are best explained by the moral reading. The most familiar example is *Brown*, which Dworkin uses to criticize originalism and as affirmative support for the moral reading. More recently, the majority opinion in *Planned Parenthood v. Casey* seems self-consciously to adopt the moral reading and law as integrity, as Dworkin effectively shows in Chapter Four of *Freedom's Law* (pp. 117–29).

In showing that the moral reading fits the practice of interpreting the concepts of equal protection, due process, and free speech, Dworkin has accomplished a great deal. Still, the Constitution contains many other important provisions. The subtitle of *Freedom's Law* is The Moral Reading of the American Constitution, not The Moral Reading of a Few Very Important Individual Rights Provisions of the American Constitution. What is the true scope of the moral reading?

B. *The Moral Reading Beyond Liberty and Equality*

In the Introduction to *Freedom's Law*, Dworkin states that not every clause of the Constitution enacts a moral principle (p. 8). This position is at odds with his more general interpretive commitments. He would do better to argue that the whole of the Constitution calls for the moral reading, although for some provisions the moral aspects will typically play a negligible role.

First consider Dworkin's own example: the requirement that the President be at least thirty-five years old (p. 8).[118] The requirement seems straightforward enough. Because any precise cut-off will be somewhat arbitrary, it makes sense to treat the provision as a reasonable, if arbitrary, line. The Constitution could have specified that the President be "sufficiently mature" for the responsibilities of the office. Such a provision might require the kind of justificatory interpretation that Dworkin believes necessary in the case of terms like due process or equal protec-

117. See id. at 190–216.

118. Dworkin gives another example of a constitutional requirement that does not enact a moral principle—the Third Amendment's prohibition on the quartering of soldiers in private homes during peacetime (pp. 8–9).

tion. Given the concrete language of the actual constitutional age requirement, however, Dworkin treats it as something less than a moral principle.

In virtually any case we can imagine arising under the Presidential age requirement, the resolution of the question seems clear. Either someone has "attained to the Age of thirty five Years,"[119] or has not. Even the hero of Gilbert and Sullivan's *Pirates of Penzance*, born on February 29th, presents an easy case.[120]

An only slightly harder case would be presented were a person delivered by Caesarian section within the United States to seek the Presidency. The same sentence requiring the President to be thirty-five years old requires that he or she be a "natural born Citizen." To be sure, "Macduff was from his mother's womb / Untimely ripp'd,"[121] and thus could kill Macbeth, notwithstanding the prophesy that "none of woman born / Shall harm Macbeth."[122] But the Bard's wordplay provides an unconvincing precedent for constitutional adjudication.

Why is the Caesarian case easy? Recall that for Dworkin, the same interpretive method operates in hard cases as in easy cases. The word "born" is not inherently ambiguous or unambiguous. We can imagine usages in which it distinguishes between vaginal births and Caesarian deliveries. But it would serve no sensible purpose to render all persons delivered by Caesarian section ineligible for the Presidency. Thus, we would interpret "born" broadly to refer to anyone delivered in the United States. It is not quite right to say that the moral (that is, principled) reading does not apply to the case; rather, the correct moral reading is obvious.

Now consider another seemingly technical constitutional provision, the requirement that "All Bills for raising Revenue shall originate in the House of Representatives."[123] Does the longstanding practice under which the President initially proposes a budget violate this requirement, or does the requirement only govern relations between the House and the Senate? Let us put aside issues of judicial competence, and assume that the President himself wishes to answer this question. He has a sworn duty to uphold the Constitution, and does not wish to violate it.

One reading would seem to condemn the established practice. If the President proposes the details of the budget, it does not "originate in the House." On the other hand, in the form the President presents his budget it is not, strictly speaking, a "Bill." Either reading is textually plausible. The fact that Presidents and Congresses have long accepted the practice of presidential proposal strongly implies that the practice fits our

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119. U.S. Const. art. II, § 1, cl. 5.

120. See W.S. Gilbert & A. Sullivan, Pirates of Penzance (1880).

121. William Shakespeare, Macbeth, act 5, sc. 8, v. 15–16, *in* The Riverside Shakespeare 1339 (Houghton Mifflin Co. 1974).

122. Id. at 1329, act 4, sc. 1, v. 80–81.

123. U.S. Const. art. I, § 7, cl. 1

constitutional tradition quite well. Still, the President may believe that his predecessors and previous Congresses never considered the constitutionality of the practice, simply following it because it was expedient. Unlike the courts, political actors do not typically engage in self-conscious justification of their conduct—even if ideally they should. Thus, the longstanding political practice may not be entitled to much weight.

Let us assume that the President believes that interpreting the practice of presidential proposal as consistent with the Constitution better fits our constitutional tradition, but interpreting the practice as unconstitutional is not automatically disqualified on the grounds of fit. He must then apply criteria of justice. At this point, one would expect Dworkin to urge the President to invoke the moral reading. What principle justifies the requirement that revenue bills originate in the House? One plausible answer is that because members of the House are elected from the smallest units that receive representation at the national level, the requirement ensures that revenue bills will be sensitive to public opinion at a local level. The provision captures the moral principle that there should be "no taxation without representation." If the President accepts this answer, he may conclude that the practice of presidential proposal is inconsistent with the moral principle. He would then have to see whether this moral consideration is sufficient to overcome the fact that a conclusion of constitutionality better fits the historical pattern than does the conclusion that principles of justice counsel.

In theory, the interpretation of any constitutional provision will sometimes call for an assessment of the provision as a moral principle. Thus, Dworkin's theory is best understood as proposing a moral reading of the whole Constitution.

Recognizing that the moral reading is a strategy for all of constitutional interpretation would help dispel the common charge that Dworkin's jurisprudence is rigged to produce politically liberal results.[124] Dworkin resists this charge in two ways. First, he contends that it is unfair to suppose that one's political philosophy would not influence one's interpretation of the Constitution (pp. 36–37). Second, Dworkin argues that the moral reading is not monolithic. He notes that when political conservatives argue that the Equal Protection Clause forbids most forms of affirmative action, they are engaging in *a* moral reading (p. 37).

Dworkin's responses to the charge of result-orientation are legitimate, but they would be strengthened by some illustrations of how the moral reading may be employed to reach answers one did not suspect he endorsed in advance. In the case of affirmative action, after all, Dworkin devotes his energy to showing that the conservative reading is an errone-

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124. For example, Patterson approvingly cites Jeffrey Rosen's complaint that " '[w]hen push comes to shove . . . legal practice does not seem to constrain Dworkin in any meaningful way' " (Patterson, p. 92 n.125 (quoting Jeffrey Rosen, "A Womb with a View," The New Republic, June 14, 1993, at 35, 36)).

ous moral reading (p. 155).[125] While Dworkin admits that the best interpretation of the Constitution does not require wealth redistribution (p. 11),[126] even though his ideal constitution would, this is a rather minimal concession: whatever chances a redistributive vision of the Constitution once had,[127] its prospects appear especially bleak today.[128]

The moral reading may be tested in an area that is emerging as one of the major battlegrounds of constitutional law: the proper balance of power between the state and national governments. Since 1992, the Supreme Court has invoked principles of federalism to invalidate: a federal requirement that some states take title to low-level radioactive waste;[129] a federal prohibition on possession of a firearm in school zones;[130] and a federal statute authorizing Indian tribes to sue states for failure to comply with regulations concerning gambling on reservations.[131] Moreover, in 1995, the Court came within one vote of upholding state-imposed term limits on the state's Congressional delegation.[132] The dissenters in that case endorsed the view that the Constitution is a creation of the people of the several sovereign states, rather than of the people of the United States as a whole.[133]

In each of the recent federalism cases, the (politically conservative) champions of robust judicial protection of state sovereignty have insisted that the Constitution enshrines state sovereignty as a matter of principle, pointing to the text of the Tenth Amendment and the Constitution's overall structure. Conversely, the proponents of national power have argued that the Constitution commits protection of state sovereign prerogatives to the political branches.[134] For example, they contend that the fact

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125. See also Dworkin, Law's Empire, supra note 4, at 393–97.

126. But see Edward B. Foley, Interpretation and Philosophy: Dworkin's Constitution, 14 Const. Commentary (forthcoming Jan. 1997) (manuscript at 29–31, on file with Columbia Law Review) (criticizing Dworkin for failing to consider constitutional right to living wage).

127. See, e.g., Frank I. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 10 (1969) (discussing equal protection claims that "government must spend its revenues in order to satisfy certain wants felt by its impecunious citizens").

128. See, e.g., Molly S. McUsic, The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. Rev. (forthcoming Oct. 1996) (stating that Supreme Court's current6 takings doctrine represents similarity to Lochner Court, in that it views redistributive legislation unfavorably).

129. See New York v. United States, 505 U.S. 144 (1992).

130. See United States v. Lopez, 115 S. Ct. 1624 (1995).

131. See Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

132. See United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

133. See id. at 1875–76 (Thomas, J., joined by Rehnquist, C.J., O'Connor & Scalia, JJ., dissenting).

134. See *Seminole Tribe*, 116 S. Ct. at 1185 (Souter, J., dissenting); *United States Term Limits*, 115 S. Ct. at 1872 (Kennedy, J., concurring); *Lopez*, 115 S. Ct. at 1639 (Kennedy, J., joined by O'Connor, J., concurring); New York v. United States, 505 U.S. at 205 (White, J., joined by Blackmun & Stevens, JJ., concurring in part and dissenting in part).

that United States Senators are selected on a state-wide basis ensures that Congress will be sensitive to state needs.[135]

By entrusting the protection of state sovereignty to the political branches, the advocates of national power would reverse the interpretive strategy proposed by Judge Learned Hand. Concerned about the counter-majoritarian difficulty, Hand argued that the Court should defer to the political branches in cases involving individual rights, resolving constitutional questions only when there is a conflict among different units of government. Although Dworkin is a great admirer of Hand, he disagrees with Hand's policy of deference in cases involving individual rights (pp. 332–47). What would Dworkin say about deference in cases involving claims of state sovereignty?

Consider, for example, the principle announced in *New York v. United States*.[136] In that case, the Court invalidated a federal statutory provision requiring states to "take title" to low-level radioactive waste within their jurisdictions in the event that they did not comply with federal deadlines for treatment and disposal of such waste.[137] The majority construed the take-title provision as a directive from Congress to a state legislature ordering the latter to enact a law, and went on to announce that the federal government lacks the power to "commandeer" the state legislative apparatus in this way.[138]

If the federal structure of American government is merely an expedient means of allocating power, then the decision in *New York* is perplexing. Indeed, it may even be perverse, for if the federal government lacks the power to commandeer the state legislative apparatus, the consequence may well be that the federal government will simply preempt the field and regulate directly, thereby entirely displacing state regulatory authority.[139] In other words, the practical effect of *New York* may be to *increase* federal power at the expense of the states.

The case takes on a different complexion, however, if we envision federalism as embodying the moral principle of state sovereignty. Just as individual rights may not be violated merely because it is expedient—or even in the interest of the right-holder—so the federal government may not interfere with state prerogatives because it is expedient, even if doing so would increase state power relative to the alternative. On the assumption that the *New York* majority was correct to view the commandeering of state legislative processes as inconsistent with state sovereignty, then taking states' rights seriously required the result the Court reached.

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135. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985).

136. 505 U.S. 144 (1992).

137. See id. at 153–54 (describing 42 U.S.C. § 2021e(d)(2)(C) (1994)).

138. See id. at 175–76.

139. See Richard E. Levy, *New York v. United States*: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power, 41 U. Kan. L. Rev. 493, 524 (1993).

At the very least, the jurisprudential approach set forth in *Freedom's Law* requires that in a close case, a Dworkinian judge would seek an interpretation of the Tenth Amendment and the Constitution as a whole that treats state sovereignty as a matter of principle, rather than expediency. This raises a difficult question, however. What moral principle does the Tenth Amendment embody? The most obvious candidate would appear to be a principle of democracy: some categories of decisions should be made by bodies representing political entities smaller than the entire nation, because these relatively local bodies will generally be more responsive to local concerns.[140] Yet this explanation is problematic in Dworkin's scheme. Localism and decentralization may be legitimate moral principles, but they do not in any way explain why the relevant boundaries should be *state* boundaries. Perhaps granting significant authority to the Rhode Island state government serves a kind of localism, but can the same be said of granting significant authority to the California or New York state government?

Moreover, the most logical local units will often consist of metropolitan areas including pieces of several states. Our constitutional system permits the creation of interstate coalitions to address regional concerns, but it does not give such coalitions the protected status it accords to states.

Indeed, if we look beyond the Tenth Amendment to the Constitution's most basic means of protecting federalism, the moral reading becomes especially strained. In the interest of federalism, the Constitution contains a virtually unamendable guarantee of unequal political representation in the national legislature—the assignment of two Senators to each state.[141] This arrangement appears to be a serious deviation from Dworkin's notion that at a minimum a constitutional democracy should treat all of its citizens with equal respect.

Let me be clear about the claim I am making. The difficulty with the Senate is not merely that its composition enables a minority to frustrate the will of the majority. Dworkin rightly notes that constitutional democracy need not mean simple majoritarianism. The problem is that the structure of the Senate gives to some voters a grossly disproportionate ability to frustrate the will of the majority—and it does so without any substantial contemporary justification. In a federal system consisting of states with significantly different ethnic, religious, cultural, or political identities, one could justify giving a minority group an effective veto power over some matters in the interest of preventing hegemony by the dominant group. But that justification surely does not apply to the United States at the end of the twentieth century.

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140. In addition, as the Framers of the Constitution argued, dividing power between the federal and state governments serves to protect liberty by ensuring that neither government becomes too powerful.

141. See U.S. Const. art. I, § 3, cl. 1. The provision is essentially unamendable because the Constitution also provides that no state may be deprived of its equal suffrage in the Senate without its consent. See U.S. Const. art. V.

Viewed from the perspective of ideal justice, our federal system is aberrant, but of course our federal system was not designed to serve ideal justice. It was the result of a political compromise at the Founding.[142] In exchange for sacrificing some of their sovereignty to the Union, the states were guaranteed equal representation in the Senate, as well as concessions embodied in other provisions of the Constitution that serve the interests of states as such. Perhaps the distinctiveness of the various states justified treating them as separate political communities at the Founding. If so, our federalist system was at one time a matter of principle; yet that does not make it so today.

It would appear that in contemporary terms one of the essential features of our Constitution—federalism—violates the core requirement of Dworkin's moral reading—equal respect. How might Dworkin resolve the tension? He might claim that the moral reading does not apply to all of the Constitution, but only to those portions that fairly appear to embody moral principles. As I noted above, this strategy is inconsistent with Dworkin's claim that the same interpretive method applies in easy cases and hard cases. Dworkin makes that claim in *Law's Empire*[143] precisely because of the difficulty that would otherwise ensue if one had to develop a theory for distinguishing between easy and hard cases or, analogously, for distinguishing between provisions that embody moral principles and provisions that do not.

Perhaps Dworkin might say that an interpreter should always strive to give a constitutional provision a moral reading, and only treat it as something less—a naked political bargain or an historical artifact—if no moral reading can make sense of the provision. Such a limited version of the moral reading would reconcile Dworkin's treatment of due process, equal protection, and free speech on the one hand, and what I believe would be his treatment of federalism, on the other. However, this strategy raises other troubling questions for Dworkin's theory.

If one thought that the provisions of the Constitution protecting federalism were aberrant, then it might be possible to treat them as exceptions to a general rule requiring a moral reading. But that is clearly not the case. For one thing, federalism itself is a pervasive and central feature of the Constitution. In addition, there are other provisions of the Constitution that seem to be best explained in historical terms. For example, Daniel Lazare argues that the venerable principle of separation of powers hamstrings modern government; although it may have originally served as a principled means of preserving liberty, he contends that under modern conditions it simply prevents necessary corrective action.[144]

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142. See Henry Paul Monaghan, We The People[s], Original Understanding, and Constitutional Amendment, 96 Colum. L. Rev. 121, 142–47 (1996).

143. See Dworkin, Law's Empire, supra note 4, at 353–54.

144. See generally Daniel Lazare, Frozen Republic: How the Constitution is Paralyzing Democracy (1996).

If Lazare is right, then the domain of the moral reading shrinks further. Were the domain very small, one would have to conclude that the moral reading does not fit the Constitution at all. At that point, Dworkin would have to proffer some special reason—beyond his general interpretive theory—why the individual rights provisions of the Constitution command a moral reading, while the rest of the Constitution does not. I do not mean to suggest that this task would be impossible. There is, after all, something of a tradition of seeing the Bill of Rights (along with the Fourteenth Amendment) as a freestanding charter of liberties with a status somewhat separate from the rest of the Constitution.[145] But given the generally universal character of Dworkin's theory, accomplishing the task would seem to require considerable effort.

The root of the difficulty I have identified may be that Dworkin's vision of law as integrity has always been a better description of common law adjudication than of statutory or constitutional interpretation. When a common law judge finds that an entrenched rule of the common law is unprincipled, or does not fit with the rest of the law, the judge can disavow the rule. However, legislatures sometimes enact statutes that cannot be understood as anything other than naked political compromises. Worse still, some such provisions worked their way into the Constitution—in, for example, the composition of the Senate, or, more shamefully, the original Constitution's acceptance of slavery. At least where the constitutional text is not susceptible to a moral reading, a judge must accept such brutish provisions, and perhaps try to ameliorate their effects.[146]

In cases involving equal protection, due process, and free speech, two factors mask the limits of Dworkin's method. First, these principles themselves have close analogues in the common law, so that, for example, a judge interpreting the equal protection guarantee can act largely as though she is following the common law requirement that like cases be treated alike. Second, there is by now such a rich collection of cases interpreting each provision that in any new case the court's primary focus will be on interpretation of the earlier cases rather than the text itself. This is a characteristically common law method.

This second factor applies more generally. Thus, even if I am right that constitutional requirements such as federalism are not in the first instance susceptible to the moral reading, perhaps the accumulation of case law interpreting such requirements successfully obscures the underlying historical compromises. American courts do not typically entertain challenges to the institution of the Senate or to the idea of federalism;

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145. But cf. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1132, 1201 (1991) (noting but disagreeing with accepted idea of Bill of Rights as separate from Constitution).

146. If a legal system is so thoroughly rotten that it has no principled core, then Dworkin would authorize the judge to lie about what the law is. See Dworkin, Law's Empire, supra note 4, at 102–08 (discussing Nazi law).

rather, they entertain disputes concerning what federalism entails. At the least, Dworkin's methods would require that the courts act in a principled manner in resolving such disputes. The question Dworkin does not address, however, is whether it is possible to give a principled interpretation to a provision that is unprincipled at its core.

The hot-button issues of the 1980s and early 1990s form the backdrop for *Freedom's Law*. These issues—abortion, the right to die, free speech, and affirmative action, to name the most prominent—show no sign of going away, and thus the insights contained in *Freedom's Law* remain highly relevant today.[147] *Freedom's Law* also points the way to a more widely applicable method. The above analysis leaves one hoping to see Dworkin apply his considerable talents to a moral reading of the entire Constitution.

CONCLUSION

In both the opening and concluding pages of *Freedom's Law*, Dworkin sets forth an argument that turns the counter-majoritarian difficulty on its head. The prominent role that courts play in our political culture, Dworkin argues, does not generate flaccid debate within an apathetic public.[148] To the contrary, because American courts are a forum of principle, they focus public debate on arguments of principle (pp. 30–31, 343–47). He speculates that our public debates about civil rights and abortion, for example, despite their bitterness, have addressed the issues more deeply than they would have by political mechanisms alone (p. 31).

The case for improved public debate through judicial prominence is necessarily speculative. We can compare American institutions to foreign ones, but we can conduct no controlled experiments. Without *Brown v. Board of Education*, what would race relations now look like? Who can say?

In at least one respect, though, *Freedom's Law* as well as *Law and Truth* constitute evidence for Dworkin's thesis that America's extensive reliance on courts enhances public debate. Neither book would have been written were it not for the prominent role our courts play in public affairs. That would have been a great loss.

147. In an essay published shortly after *Freedom's Law*, Dworkin continues to focus on questions of liberty and equality. See Ronald Dworkin, Sex, Death, and the Courts, N.Y. Rev. of Books, Aug. 8, 1996, at 44 (discussing Romer v. Evans, 116 S. Ct. 1620 (1996), Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), and Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996)).

148. Dworkin attributes the claim he denies to Learned Hand (pp. 342–43). For recent versions of the argument, see Daniel Lazare, supra note 144, at 1–10; Mary Ann Glendon, Abortion and Divorce in Western Law 24, 33–39, 45 (1987).